



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 77-1101

PAPPAS TELEVISION, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA.

Respondents.

PETITIONER'S APPENDIX

RICHARD HILDRETH

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APPENDIX

Communications Act of 1934, as amended, 48 Stat. 1064, 47 U.S.C. §151 *et seq.*

§152. *Application of Chapter*

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or transmission wholly within the Canal Zone.

* * *

§303. *Powers and duties of Commission*

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall —

* * *

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: *Provided, however,* That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission

shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

* * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

* * *

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In re]	
FRESNO CABLE TV CO., INC.]	
Madera and Clovis, California]	
Application for Certificate of	]	File No. CAC-432
Compliance for Cable Television	]	CAC-433
Systems]	
To the Cable Television Bureau]	

TEL-AMERICA CORPORATION OBJECTION TO
APPLICATION FOR
CERTIFICATE OF COMPLIANCE

1. Tel-America Corporation is the licensee of UHF Television Station KAIL, Fresno, California. The cities applied for (Madera and Clovis) are less than 25 miles from Fresno, and are within the coverage area of KAIL.

2. The importation of the proposed signals of San Francisco television stations (KTVU, KBHK and KQED) into the Fresno market in the manner proposed can only serve to fragment the audience available for *local* Fresno stations which are incurring the expense of local program origination in order to meet the needs of area residents, including those of Clovis and Madera. The Commission should take note of the difficult competitive situation prevailing in the Fresno market. The other television stations in the Fresno market are three network affiliates and an independent station which is under common ownership with a local AM station. KAIL has none of these advantages, but has continued its efforts to establish a place in the Fresno market.

3. The KAIL renewal application (filed in 1971) reflects the difficult situation in the Fresno market. KAIL's accumulated deficit to July 1, 1970 was \$337,659. The 1970-71 fiscal year brought further losses of \$102,102, increasing the accumulated deficit to \$439,761 (BRCT-557, amendment of 11/26/71). Losses have continued since then.

4. The policy considerations which support the importation of distant signals into rural areas which would otherwise remain without adequate service simply do not apply to a market with a full complement of *local* stations like Fresno, especially when some of them may not be able to attract sufficient revenue to continue their local program service. Draining off the audience in the Fresno market by providing major metropolitan stations' signals is hardly conducive to the development and continuation of local program origination.

5. KAIL also objects to Fresno Cable's proposal to carry KFTV, Hanford, as another distant signal. KFTV is an outstanding permittee (not now on the air) which proposed to broadcast Spanish-language programming as a *100% satellite* of a Los Angeles station. KAIL has for years carried a substantial amount of programming of special interest to the large Spanish-speaking population in the Fresno area, *locally originated*, and of course responsive to the particular problems and concerns of the *local* Spanish-speaking population. To permit fragmentation of KAIL's audience to the north of Fresno by importing a Spanish-language program service from Los Angeles (through a satellite station) is surely inimical to the development of local ethnic-oriented programming. Such a policy would lead eventually to the nation's widely-scattered minority population being served *only* by ethnic programming from the few largest metropoli-

tan centers, leaving substantial minority groups in smaller cities like Fresno without locally responsive programming. That result is contrary to the mandate of Section 307(b) of the Communications Act.

6. The KAIL renewal application (BRCT-557) shows that KAIL has carried these Spanish programs:

ESTA LA VIDA: 30 minutes weekly (Exhibit 4c and 5d)

ABC's OF INCOME TAX—Spanish: Carried in March 1971 (Exhibit 5d)

Newscasts in Spanish by Frederico Gomez, Tiburcio Garcia and Henry Ortega (Exhibit 6)

KAIL has a Spanish director and interpreter (Exhibit 11). KAIL has received numerous awards and commendations for its Spanish programming, as well as receiving the support of the Mexican-American public and its major civic and religious organizations (Exhibit 14).

7. The Commission's oft-expressed concern for the interests of minority groups is not consistent with allowing unlimited importation of distant-city minority-oriented programming which fragments the audience for *local* programming of special interest to the Spanish-speaking population. Accordingly, the proposal for importation of the KFTV signal must be rejected.

ACCORDINGLY, the requested certificates cannot be granted as requested, but must be conditioned to provide against importation of distant signals from San Francisco and Hanford as outlined above.

Respectfully submitted,

TEL-AMERICA CORPORATION

By /s/ Samuel Miller
Samuel Miller

/s/ Mark E. Fields
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Certificate of Service

This is to certify that I have, on this 12th day of July, 1972, deposited in the U.S. mails, postage prepaid, a true and correct copy of the foregoing, to the following:

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[48 F.C.C.2d 116-122]

FCC 74-845

[116]

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of)	
Fresno Cable TV Co., Inc.,	)	CAC-432,
Madera, Calif.	)	CSR-171, CA441
	)	CAC-433,
Fresno Cable TV Co., Inc.,	)	CSR-172, CA442
Clovis, Calif.)	
For Certificates of Compliance)	

MEMORANDUM OF OPINION AND ORDER

(Adopted July 31, 1974; Released August 9, 1974)

BY THE COMMISSION:

1. Fresno Cable TV Company, Inc. (hereafter Fresno Cable), has filed the above-captioned applications for certification to commence cable television operations at Madera, and Clovis, California.¹ Fresno Cable proposes to carry the following California television signals:

KMJ-TV (NBC, Channel 24) Fresno, California
 KFSN-TV (CBS, Channel 30) Fresno, California
 KJEO (ABC, Channel 47) Fresno, California
 KAIL (Ind., Channel 53) Fresno, California
 KFTV (Span. Lang., Channel 21) Hanford, California

¹Clovis (pop. 13,856), and Madera (pop. 16,044) [1970 census] are located within the specified zone of the Fresno, California, major television market (#72).

KTXL (Ind., Channel 40) Sacramento, California
 KTVU (Ind., Channel 2) Oakland, California
 KQED (Educ., Channel 9) San Francisco, California

This proposal is consistent with Section 76.63(a) of the Commission's Rules. Fresno Cable plans to construct 30-channel capacity systems and to provide the full complement of access facilities and services required by Section 76.251 of the Rules. Fresno Cable's applications are opposed by Camellia City Telecasters, Inc., licensee of Television Broadcast Station KTXL, Sacramento; Tel-America Corporation, licensee of Television Broadcast Station KAIL, Fresno; and Pappas Television, Inc., licensee of Television Broadcast Station KMPH, Tulare, California. Additionally, Pappas has filed "Petition[s] for Special Relief" (CSR-171, 172) which are supported by "Comments" filed by Capital Cities Broadcasting Corporation, licensee of Station KFSN-TV, Fresno. Fresno Cable has replied.

2. Camellia's objections were prompted by Fresno Cable's original request to carry KBHK-TV (Ind., Channel 44), San Francisco, instead of Camellia's KTXL. In response to these objections, Fresno Cable amended its applications on March 27, 1973, to delete its request to carry KBHK-TV and to request carriage of KTXL. On March 30, 1973, Camellia filed pleadings requesting that its objections be dismissed. In view of the foregoing, the objections filed by Camellia will be dismissed as moot.

3. Tel-America objects to Fresno Cable's proposal to import educational and independent signals from San Francisco into the Fresno market, and to the cable systems' proposed carriage of Spanish language Station KFTV, Hanford. Tel-America argues that importation of

San Francisco signals would "only serve to fragment the audience available for local Fresno stations which are incurring the expense of local program origination in order to meet the needs of area residents." This fragmentation, Tel-America continues, would endanger financially insecure stations, such as Tel-America's KAIL, and would frustrate their attempts to establish a foothold in what is alleged to be a highly competitive television market. Carriage of KFTV, Tel-America asserts, would seriously fragment a specialized audience and would, therefore, inhibit KAIL in its attempt to develop locally originated and locally responsive Spanish language programming.² The Commission is persuaded that special circumstances exist in the present case to warrant granting Tel-America some relief. As we noted in Paragraph 96 of the *Cable Television Report and Order*, 36 FCC 2d 143, 180 (1972):

Where there is a local station broadcasting predominantly in a foreign language, the added diversity provided by the carriage of distant foreign language stations broadcasting in the same language will be permitted unless the local station demonstrates that such importation will adversely affect its ability to serve the public.

We further clarified the type of showing necessary to obtain relief in Paragraph 23 of the *Reconsideration*, 36 FCC 2d 326, where we indicated we would grant special relief pursuant to Section 76.7 of the Commission's Rules only in unusual circumstances where the station made a compelling demonstration. In this case, we are faced with an extremely vulnerable UHF station that has suffered continuing losses, and is,

²KFTV currently operates as a full-time satellite of Spanish language Station KMEX-TV, Los Angeles, California.

at this time, going through considerable expense to upgrade its facilities in an attempt to become a viable local Spanish language outlet. We believe, based on the information before us, that this attempt to become a viable local Spanish language station could be destroyed by the carriage of another Spanish language station. Accordingly, we will deny Fresno Cable's proposed carriage of KFTV.

4. Pappas requests that Fresno Cable's applications be dismissed as procedurally defective because (1) Fresno Cable failed to serve Pappas with the information required by Section 76.13(b)(1) of the Rules,³ and (2) Fresno Cable failed to submit, with its original applications, copies of its franchises and statements explaining how those franchises are consistent with the Commission's Rules. Substantively, Pappas requests that certification of Fresno Cable's applications be conditioned upon (a) carriage of KMPH and (b) non-[118] carriage of any distant independent television station. To support this request, Pappas raises the following arguments:

(1) Even though Clovis and Madera are located beyond the specified zone of the Tulare television market, KMPH is nonetheless a "local station" that has an affirmative obligation to serve these communities. This obligation will be frustrated if KMPH is denied carriage rights on cable systems located in these communities.

(2) KMPH is "significantly viewed" in Clovis and Madera, even though the station is not afforded that status by Section 76.54(a) of the Rules and

³Pappas' KMPH places a predicted Grade B contour over the communities of Clovis and Madera.

Appendix B of the *Reconsideration*.⁴ KMPH was not listed as a "significantly viewed" station because it was not broadcasting during the survey periods utilized by the Commission in compiling its list of "significantly viewed" signals.⁵ To secure mandatory carriage rights under Section 76.54(b), Pappas would have to submit surveys demonstrating the viewing strength of KMPH for each cable television community where such carriage rights are sought. Because Pappas is seeking mandatory carriage rights for KMPH throughout the lower San Joaquin Valley, it would be forced to incur onerous expenses in order to prepare and submit such showings. This burden is imposed upon Pappas solely because KMPH was not broadcasting when the original list of signals in Appendix B of the *Reconsideration* was prepared. In this respect, Section 76.54(b) discriminates against KMPH because it is a "new" television station.

(3) Pappas' current financial position is precarious. This position will be eroded further by the competitive disadvantage Pappas will face if KMPH is not afforded the same signal carriage rights provided other Fresno market stations.

(4) The Fresno television market is unique and highly competitive, and independent television stations have consistently encountered difficulties in

⁴Section 76.54(b) of the Commission's Rules provides that: Signals that are significantly viewed in a county (and thus are deemed to be significantly viewed within all communities within the county) are those that are listed in Appendix B of the *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order* (Docket 18397 et al.). FCC 72-530.

⁵KMPH commenced operations on October 11, 1971. The Commission utilized surveys conducted by the American Research Bureau during May, 1970, November, 1970, and February-March, 1971, in preparing its list of "significantly viewed" signals.

attempting to establish a position in the market.⁶ Pappas has invested over a million dollars in facilities and equipment in an attempt to reverse this trend, and it will not succeed if it is denied carriage rights on cable television systems located outside the specified zone of Tulare.

(5) The unique and competitive nature of the Fresno market, coupled with the financial insecurity of KMPH, warrants Commission action insulating that station from competition by the distant independent signals Fresno Cable proposes to import. [119] The dilution in audience strength that would be caused by this competition would only serve to aggravate KMPH's already precarious position.

5. Pappas' procedural arguments do not persuade us to dismiss the present applications. Fresno Cable's failure to serve Pappas with the information required by Section 76.13(b)(1) of the Rules has in no way prejudiced Pappas. Pappas had actual notice that the applications were filed and was able to respond to them in its objections and petitions for special relief. Pappas claims it was prejudiced because it had a shorter time in which to prepare its arguments. It did not, however, request an extension of time to file objections. Furthermore, Fresno Cable served Pappas with copies of all its further pleadings. Fresno Cable's original failure

⁶KVVG, Tulare, suffered economic reverses during the 1950's and went dark. KDAS (later KSJV-TV and now KFTV) failed under a number of licensees during the 1960's and is now operated as a satellite of KMEX-TV, Los Angeles. KICU-TV, Visalia, went dark in November, 1968. KAIL, Fresno, followed suit on April 17, 1973. Seven commercial UHF channels are allocated to Fresno, Hanford, Tulare, and Visalia, and all have been occupied by licensees or permittees at various points in time. Until KAIL went dark last year, the Fresno ADI was the smallest market in the nation to be served by three local independent stations.

to demonstrate compliance with Section 76.31 of the Rules was rectified in supplements, filed January 30, 1973, which included, copies of the franchises and subsequent amendments thereto. Since the franchises were granted on April 19 (Madera), and June 7 (Clovis), 1967, Fresno Cable need only demonstrate that they are "substantially consistent" with Section 76.31. See "Note" to Section 76.13(b)(3) of the Commission's Rules. Although Pappas has not responded to the supplements, we note that, with some exceptions, the franchises conform fully with Section 76.31.⁷ We conclude that the franchises submitted by Fresno Cable are substantially consistent with Section 76.31. See *CATV of Rockford, Inc.*, FCC 72-1005, 38 FCC 2d 10 (1972), *recons. denied*, FCC 73-293, 40 FCC 2d 493 (1973).

6. We are, likewise, not persuaded that we would be serving the public interest by rejecting Fresno Cable's proposal to supply its subscribers with independent programming from San Francisco and Sacramento market television stations. We note, initially, that this proposal is fully consistent with Section 76.63(a) of our Rules. In Paragraph 112 of the *Cable Television Report and Order*, *supra*, at 186-87, we stated:

⁷The franchises are for 20-year terms, and they impose annual franchise fees of 5 percent (for the first two years of operation) and 5½ percent (for subsequent years). On November 6, 1972, the Clovis City Council adopted a resolution establishing a subscriber complaint procedure, providing for the incorporation of all future modifications of Section 76.31, and assuring that the franchise grant was preceded by a review of Fresno Cable's legal, character, financial, technical, and other qualifications as part of a public proceeding affording due process. An identical resolution was adopted by the City Council of Madera on December 4, 1972.

The [signal carriage] rules will operate on a "go, no-go" basis—i.e., the carriage rules reflect our determination of what is, at this time, in the public interest with respect to cable carriage of local and distant signals. We will, of course, consider objections to signal carriage applications and have retained special relief rules, but those seeking signal carriage restrictions on otherwise permitted signals have a substantial burden. Before restrictions are imposed in such cases, there will have to be a clear showing that the proposed service is not consistent with the orderly integration of cable television service into the national communications structure and that the results would be inimical to the public interest. We have during the course of this proceeding fully considered the question of impact on local television service and we do not expect to re-evaluate that general question in individual cases.

Additionally, in Paragraph 113 of the *Cable Television Report and Order*, *supra*, at 187, we explained that "there must be a substantial showing to warrant deviation from the 'go, no-go' concept of the Rules." The "substantial showing" standard was clarified in *Gerity* [120] *Broadcasting Co.*, FCC 72-651, 36 FCC 2d 69 (1972), in which we held that such showing must "contain specificity of fact, showing injury to the public" before special relief could be granted. Although Pappas has submitted showings demonstrating its financial insecurity, its argument that KMPH will suffer further economic injury as a direct result of Fresno Cable's proposed distant signal carriage is, at best, no less speculative and inclusive than arguments this Commission has rejected in the past. *Spectrum Cable Systems, Inc.*, FCC 73-257, 40 FCC 2d 1019 (1973),

recons. denied, FCC 73-1342, 44 FCC 2d 867 (1973); *Greater New England Cablevision Co.*, FCC 74-42, 45 FCC 2d 597 (1974);⁸ *Valley Cable Vision, Inc.*, FCC 73-1246, 44 FCC 2d 232 (1973). Additionally, Pappas has submitted nothing to support its assertion that carriage of only "local" television stations, coupled with the presentation of origination and access programming, will provide sufficient inducements to attract subscribers and make Fresno Cable's operations in these communities viable. In this respect, Pappas has not demonstrated that a grant of its request would facilitate "the orderly integration of cable television service into the national communications structure." Para. 112, *Cable Television Report and Order*, *supra*. Accordingly, Pappas' request that Fresno Cable be prohibited from carrying distant independent signals on its cable systems at Clovis and Madera, California, will be denied.

7. We find merit, however, in Pappas' request for expanded carriage rights in the lower San Joaquin Valley. It seems clear that KMPH will suffer a substantial competitive disadvantage if it is not afforded signal carriage rights at least as expansive as those enjoyed by competing stations in the Fresno market. It seems equally clear that KMPH can acquire such rights only if it can establish, pursuant to the procedures outlined in Sections 76.54(b) and (c) of the Rules,⁹

⁸ Appeals pending *sub nom.*, *Springfield Television Broadcasting Corp. v. F.C.C.*, Case Nos. 74-1214, 1215, D.C. Circuit, and *The WHYN Stations Corp. v. F.C.C.*, Case Nos. 74-1216, 1217, D.C. Circuit.

⁹ Sections 76.54(b) and (c) of the Commission's Rules provide that:

(b) On or after March 31, 1973, significant viewing in a cable television community for signals not shown as significantly viewed under paragraph (a) of this section may

[footnote continued]

that it is "significantly viewed" in each cable community where carriage is desired. The cost of preparing and submitting special surveys demonstrating KMPH's viewing strength in each existing and potential cable community in the lower San Joaquin Valley would be substantial and would probably preclude an attempt by Pappas to submit such showings for most such communities. Consequently, it appears that the application of Section 76.54 in this market imposes an undue burden upon KMPH in acquiring signal carriage rights coextensive with those held [121] by other market stations because KMPH was not broadcasting between May, 1970, and March, 1971, when ARB conducted the surveys we used in preparing the list of "significantly viewed" signals. In adopting our present

be demonstrated by an independent professional audience survey of non-cable television homes that covers at least two weekly periods separated by at least thirty (30) days but no more than one of which shall be a week between the months of April and September. If two surveys are taken, they shall include samples sufficient to assure that the combined surveys result in an average figure at least one standard error above the required viewing level. If surveys are taken for more than two weekly periods in any 12 months, all such surveys must be submitted and the combined surveys must result in an average figure at least one standard error above the required viewing level.

(c) Notice of a survey to be made pursuant to paragraph (b) of this section shall be served on all licensees or permittees of television broadcast stations within whose predicted Grade B contour the cable community is located, in whole or in part, and on all cable systems, franchisees, and franchise applicants in the cable community at least thirty (30) days prior to the initial survey period. Such notice shall include the name of the survey organization and a description of the procedures to be used. Objections to survey organizations or procedures shall be served on the party sponsoring the survey within twenty (20) days after receipt of such notice.

cable rules, we decided to utilize county-wide data to determine viewing strength of television broadcast stations, even though we recognized that such data "may not account for variations in viewing levels among communities within [a] county", because (1) county-wide data is generally used by the television industry without differentiation between communities within counties, and (2) utilization of existing data and accepted techniques would promote a degree of certainty that could not otherwise be achieved. Para. 85, *Cable Television Report and Order*, FCC 72-108, 36 FCC 2d 143, 175-6 (1972). We reaffirmed this decision in the *Reconsideration*, indicating that, while we recognized our choice of a county-wide basis to be "at best a choice among reasonable alternatives", community by community viewing data "was simply not . . . available." Paras. 53, 60, *Reconsideration of Cable Television Report and Order*, FCC 72-530, 36 FCC 2d 326, 345-6, 348-9 (1972). We were, however, unwilling at that time to expand our utilization of county-wide data, and we "saw no reason" to permit special viewing strength surveys, submitted pursuant to Sections 76.54(b) and (c), to be undertaken on a county-wide basis, *id.*, Para. 60, although we did note the concern expressed by some broadcasters that this conclusion would aggravate the difficulties television stations would face in establishing "significantly viewed" status under those sections, "especially if they [were] new stations or [had] recently improved their facilities or programming." Addressing this concern, we indicated that:

In these circumstances, it would not be appropriate to set conditions automatically discouraging carriage or act to penalize cable systems seeking carriage of such stations by forcing a

choice between deletion of stations to which subscribers have become accustomed and the addition of stations whose off-the-air audience has improved. Thus, while we do not anticipate problems in this area, if problems do arise, they can best be considered in individual proceedings.

Para. 63, *Reconsideration, supra*, at 350. We conclude that the special survey requirements of Sections 76.54(b) and (c) do operate to discourage carriage of KMPH and to penalize cable systems in the lower San Joaquin Valley seeking carriage of that station. Accordingly, we have decided that the public interest would be served by a grant of special relief to Pappas Television, Inc. The extent of and conditions to that relief will be as follows:

(a) We will grant a partial waiver of Section 76.54(b) to permit Pappas to submit surveys demonstrating the viewing strength of KMPH on a county-wide, as opposed to a per-community basis. We emphasize that, although they may gauge viewing strength on a county-wide basis, the surveys submitted must in all other respects conform fully to the standards specified in Section 76.54(b).¹⁰

(b) We recognize that data sufficient to adequately demonstrate KMPH's viewing strength in the lower San Joaquin Valley may [122] have already been compiled, and we do not wish to prevent Pappas from utilizing such data in the showing we are permitting it to submit. Accordingly, we will grant a waiver of Section 76.54(c) and will not require Pappas to serve notification of its intent to submit a special showing 30 days prior to the initial survey

¹⁰However, we will additionally waive the requirement of Section 76.54(b) that "... surveys result in an average figure at least one standard error above the required viewing level."

period it proposes to utilize in making such a showing.

(c) In lieu of the notice procedures outlined in Section 76.54(c), we will require Pappas to submit to the Commission, and to serve upon the licensee or permittee of any television broadcast station placing a predicted Grade B contour over all or any part of any county in which Pappas proposes to demonstrate KMPH's viewing strength, the certified results of all independent professional audience surveys utilized to demonstrate such viewing strength. The Commission will entertain objections or comments filed by the above-described licensees or permittees, if such objections or comments are filed within 30 days after service of the above-described survey results. If, upon review of those results, we find KMPH is "significantly viewed" in a county [i.e., that the station has a share of viewing hours of at least 2 percent (total week hours), and a net weekly circulation of at least 5 percent in that county], we will afford the station mandatory signal carriage rights on all cable systems operating or proposing to operate in that county.

8. We emphasize that the relief we are granting by this action is experimental in nature. Until we have had an opportunity to evaluate its effect upon the parties involved or interested in these proceedings, we will be unwilling to grant similar relief in different markets.

In view of the foregoing, the Commission finds that a grant of the above-captioned applications for certificates of compliance would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Objection[s] to Applications," filed by Camellia City Telecasters, Inc., on July 12, 1972, ARE DISMISSED as moot.

IT IS FURTHER ORDERED, That the "Objection[s]" filed by Tel-America Corporation on July 12, 1972, ARE GRANTED to the extent indicated in paragraph 3 above.

IT IS FURTHER ORDERED, That the "Objection[s]" and "Petition[s] for Special Relief" (CSR-171, 172), filed by Pappas Television, Inc., on July 12, 1972, and the "Comments on Petition[s] for Special Relief," filed by Capital Cities Broadcasting Corporation on August 11, 1972, ARE GRANTED, to the extent and under the conditions specified herein, and in all other respects ARE DENIED.

IT IS FURTHER ORDERED, That the "Application[s] for Certificate of Compliance" (CAC-432, 433), filed by Fresno Cable TV Company, Inc., ARE GRANTED, until March 31, 1977, and appropriate certificates of compliance will be issued.

Federal Communications Commission,
Vincent J. Mullins, *Secretary*.

[50 F.C.C.2d 340-345]

FCC 74-1396

[340] **BEFORE THE**
FEDERAL COMMUNICATIONS COMMISSION
 WASHINGTON, D.C. 20554

In Re Applications of)	
Fresno Cable TV Co., Inc.,	)	CAC-432,
Madera, Calif.	)	CSR-171, CA441
	)	CAC-433,
Fresno Cable TV Co., Inc.,	)	CSR-172, CA442
Clovis, Calif.)	
For Certificates of Compliance)	

MEMORANDUM OPINION AND ORDER

(Adopted December 17, 1974; Released January 6, 1975)

BY THE COMMISSION:

1. Spanish International Communications Corporation, licensee of Station KFTV (Spanish language, Channel 21) Hanford, California, and Pappas Television, Inc., licensee of Television Broadcast Station KMPH (Ind., Channel 26) Tulare, California, seek reconsideration of Commission action taken in *Fresno Cable TV Co., Inc.*, FCC 74-845, 48 FCC 2d 116 (1974). Pappas's [sic] petition is opposed by Fresno Cable TV Company, Inc., and Spanish International's petition is unopposed. Pappas has replied to the opposition of Fresno Cable.

2. Spanish International seeks reconsideration of that part of the Commission's decision which granted special relief to Tel-America Corporation, licensee of Television Broadcast Station KAIL (Spanish language, Channel 53) Fresno, California, by denying the cable television

system certification for carriage of KFTV. The Commission found that "based on the information before us...this attempt [by KAIL] to become a viable local Spanish language station could be destroyed by the carriage of another Spanish language station."¹

3. Spanish International did not participate in the initial action. Section 1.106(b) of the Commission's Rules requires that one seeking reconsideration who was not a party to the initial proceeding "state with particularity the manner in which...his interests are adversely affected by the action taken, and...show good reason why it was not possible for him to participate in the earlier stages of the proceeding." In meeting this burden, Spanish International states that "it has long been recognized" that denying cable television carriage to a television broadcast station adversely affects that station, and that it was unaware of Tel-America's petition which sought deletion of Spanish International's Station KFTV from the Clovis and Madera systems. It states that KFTV is a "must carry" station² in both Clovis and [341] Madera,

¹On November 22, 1974, the Commission extended authority granted KAIL to remain silent temporarily, until January 17, 1975.

²Section 76.61 of the Commission's Rules, as it relates to Section 76.63 provides for a cable television system located within the second fifty major television markets that:

(a) Any such cable television system may carry, or on request of the relevant [341] station licensee or permittee, shall carry the signals of:

(1) Television broadcast stations within whose specified zone the community of the system is located, in whole or in part....

* * * * *

(4) Television broadcast stations licensed to other

[footnote continued]

because it is significantly viewed in all of Fresno County, and, in addition, that it is a "must carry" station in Clovis because Clovis is located within KFTV's specified zone and in Madera because KFTV's community of license (Hanford) and Madera are within the same television market (Fresno). To establish that KFTV is significantly viewed in Fresno County, Spanish International has submitted a survey conducted among 460 Spanish-surnamed households in Fresno, Madera, and Tulare counties from February 18, to March 15, 1974. Spanish International asks that waiver be granted to the extent that the survey fails to satisfy the requirements of Section 76.54 of the Rules.³ In further

designated communities of the same major television market (Example: Cincinnati, Ohio-Newport, Kentucky television market).

(5) Commercial television broadcast stations that are significantly viewed in the community of the system. See §76.54.

³ §76.54 Significantly viewed signals; method to be followed for special showings:

(a) Signals that are significantly viewed in a county (and thus are deemed to be significantly viewed within all communities within the county) are those that are listed in Appendix B of the *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order* (Docket 18397 et al.), FCC 72-530.

Since KFTV is not listed in Appendix B as being significantly viewed in Fresno County, it may establish its status pursuant to Sections (b) and (c):

(b) On or after March 31, 1973, significant viewing in a cable television community for signals not shown as significantly viewed under paragraph (a) of this section may be demonstrated by an independent professional audience survey of non-cable television homes that covers at least two weekly periods separated by at least thirty (30) days but no more than one of which shall be a week between the months of April and September. If two surveys are

[footnote continued]

support of its petition for reconsideration, Spanish International states that it has abandoned satellite status and is now supplying locally originated Spanish language programming.⁴

4. Given the change in circumstances, we believe that partial grant of Spanish International's petition for reconsideration is in the public interest. Our action in the initial proceeding was based upon KFTV's status as a satellite station, not originating local programming, and was designed to protect the struggling "local" Spanish language station (KAIL) from competition by another Spanish language station (KFTV) whose carriage was not mandatory. Now, however, KFTV, as a television broadcast station within whose specified zone

taken, they shall include samples sufficient to assure that the combined surveys result in an average figure at least one standard error above the required viewing level. If surveys are taken for more than two weekly periods in any 12 months, all such surveys must be submitted and the combined surveys must result in an average figure at least one standard error above the required viewing level.

(c) Notice of a survey to be made pursuant to paragraph (b) of this section shall be served on all licensees or permittees of television broadcast stations within whose predicted Grade B contour the cable community is located, in whole or in part, and on all cable systems, franchisees, and franchise applicants in the cable community at least thirty (30) days prior to the initial survey period. Such notice shall include the name of the survey organization and a description of the procedures to be used. Objections to survey organizations or procedures shall be served on the party sponsoring the survey within twenty (20) days after receipt of such notice.

⁴ Station KFTV's Annual Programming Report (FCC 303-A) indicates that local programming represents 231 minutes, or 7.6 percent, of its total weekly programming.

the city of Clovis is located,⁵ is asserting its mandatory carriage rights on the Clovis system, pursuant to Section 76.61(a)(1). We will therefore require its carriage, and we will amend the certificate of compliance for the Clovis cable television system accordingly. However, we reject [342] Spanish International's contention that the signal is entitled to mandatory carriage on the Madera system. Madera is located 48.79 miles from Hanford, clearly beyond KFTV's 35 mile specified zone. And even though Hanford and Madera are both within the Fresno Market, only television broadcast stations "licensed to other designated communities within the same major television market" are accorded "must carry" status; Hanford is not such a designated community.⁶ We recognized in the *Cable Television Report and Order*, FCC 72-108, 36 FCC 2d 143, 170 (1972) at n. 37 that various audience rating services recognize different communities as being in the same hyphenated markets but stated that our new rules designate specifically the hyphenated major markets for cable television purposes. The smaller Hanford market is not hyphenated with the major Fresno market in Section 76.51 of the Rules. Nor do we believe it appropriate to accept Spanish International's market survey as establishing that KFTV is significantly viewed. The survey contains no indication that it was confined to non-cable television homes; the weekly periods during which the survey was conducted were not taken

⁵Clovis is 34.08 miles from Hanford. A station's specified zone is defined in Section 75.5(f) as "extending 35 air miles from the reference point in the community to which the station is licensed. . . ."

⁶A "[d]esignated community in a major television market" is defined at Section 76.5(h) of the Rules as "[a] community listed in §76.51."

thirty days apart; the survey expressly states that "[e]rrors in measurement cannot be computed for the measurements in this survey"; and no notice of the survey was provided to the necessary parties. While we have previously permitted certain minor deviations from the requirements of Section 76.54,⁷ we will not grant its blanket waiver. In these circumstances, KFTV has no mandatory carriage rights on the cable system at Madera, and we will deny its request for carriage.

5. Pappas Television, Inc., seeks reconsideration of that part of *Fresno Cable TV, supra*, which granted certification for carriage of Television Broadcast Stations KTVU (Ind., Channel 2) Oakland, California and KTXL (Ind., Channel 40) Sacramento, California. In the alternative, Pappas requests that the Commission "conduct a hearing on the question of lost or diminished local independent television service." In support of its petition, Pappas makes the following arguments:

(a) Since the Commission, with all its expertise, has been unable to determine the precise impact "distant" signal importation by cable television systems has on "local" television broadcast stations, it is placing an impossible burden on Pappas to state with precision what further losses will result if the two independent stations are carried. Pappas has met its burden of proof in showing that it is already suffering substantial losses, and therefore cannot withstand any impact; moreover, the Commission has not clearly articulated the showing that a television broadcast station must make to prevent market penetration by "distant" signals, nor did it inform Pappas of the deficiencies in its original showing.

⁷See, e.g., *Fresno Cable TV Co., Inc.*, FCC 74-845, 48 FCC 2d 116 (1974); *Cablevision of Marlow, Inc.*, FCC 73-1273, 44 FCC 2d 257 (1973).

(b) The Commission appears to place on Pappas a "novel and improper burden" of showing that cable service will be viable without the proposed signals. If cable systems cannot become [343] viable through various nonbroadcast services, "the loss to the public of such services is far less than the loss to the whole public of local broadcast service."

(c) In not processing all of Fresno Cable's applications for its conglomerate systems together, the Commission has failed to follow its own precedent and has failed to reach the question of the cumulative impact that carriage of the distant independent stations will have on KMPH.

(d) Denying relief to KMPH is inconsistent with that part of the decision which grants relief to KAIL, "an extremely vulnerable UHF station that has suffered continuing losses".

(e) Pappas's [sic] request for relief may not be denied without a hearing since it involves a question of destructive competition from television stations whose signals are imported by cable. *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (1958); *Folkways Broadcasting v. FCC*, 375 F.2d 299 (1967).

6. In its reply to Pappas's [sic] petition, Fresno Cable states that the Commission's carriage rules are designed to operate on a "go, no-go" basis, and that no deviation from this standard will be made without a substantial showing, specific and factually supported, that injury to the public will result if carriage is permitted. According to Fresno Cable, no showing of the amount of audience KMPH will lose if the distant signals are carried, the consequent loss in advertising revenue, and the effect on programming, particularly news and public affairs, has been made, and the losses currently being suffered are to be expected in the initial operations of

independent UHF stations. Fresno Cable further contends that no hearing prior to denial of the requested relief is necessary, since Pappas has failed to establish that KMPH will suffer a loss or degradation of service to the public. Pappas states, in reply, that precise impact measurements or specifications of programs to be affected are not required, and that the "go, no-go" standard cannot apply where local service in fact is threatened.

7. We do not find Pappas's [sic] request for reconsideration persuasive for the following reasons:

(a) (e) In our initial decision, we quoted from paragraphs 112 and 113 of the *Cable Television Report and Order*, FCC 72-108, 36 FCC 2d 143, 187-87 (1972) and from *Gerity Broadcasting Co.*, FCC 72-651, 36 FCC 2d 69 (1972) to reiterate the standard which a television broadcast station must satisfy to limit cable television signal carriage to less than the complement we had found, after much study and experience, necessary to promote the orderly integration of cable television into the national communications structure. That standard requires that a station make a substantial showing, containing specificity of fact, that the proposed cable television service will adversely affect the station's revenues and its ability to serve the public interest. See also Paragraph 91, *Cable Television Report and Order*, *supra*, at p. 179. Pappas states in its pleadings that "[a]lthough KMPH did not present statistics as to how many viewers of its station would choose independent station programming from distant stations... and did not state [344] how many rating points, advertisers, and advertising dollars would be lost to it if distant signals were carried, such precise statistics are not necessary here where KMPH is already operating at a loss." Yet, before we will

handicap a new cable television system by denying it "the minimum amount of new service needed to attract large amounts of investment capital for the construction of new systems . . . to open the way for the full development of cable's potential"⁸ it is precisely this sort of information, contained in an economic projection, that is necessary. Absent the detailed, factual information, which Pappas has deemed unnecessary, its contentions again must be dismissed as speculative and unsubstantiated.⁹ *Spectrum Cable Systems, Inc.*, FCC 73-257, 40 FCC 2d 1019, *recons. denied*, FCC 73-1342, 44 FCC 2d 867 (1973), *app. pending sub nom. Springfield Television Broadcasting v. FCC*, cases number 74-1214 and 74-1217 (D.C. Cir.).¹⁰ For the same reasons we do not believe Pappas has met the threshold showing necessary to require a hearing. *See Wheeling Antenna Co. v. United States*, 391 F.2d 179 (4th Cir. 1968).

(b) We stated in the *Cable Television Report and Order*, *supra*, at paragraph 112, that before restricting cable television systems to less than the number of signals we believe necessary to achieve viability, there would have to be a clear showing that the restriction would not be inconsistent with our goal of achieving

⁸ Paragraph 90, *Cable Television Report and Order*, *supra*, at p. 178.

⁹ We again note that both of the cable television systems are more than eight miles outside KMPH's specified zone.

¹⁰ See also *King Video Cable Co.*, FCC 74-988, _____ FCC 2d _____ (1974); *Multi-Pix, Inc.*, FCC 74-743, 47 FCC 2d 1138 (1974); *Cable Antenna Systems*, FCC 74-646 FCC 47 2d 343 (1974); *Community Television of Montana, Inc.*, FCC 74-231, 45 FCC 2d 826 (1974); *Monroe All-Channel Cablevision, Inc.*, FCC 74-200, 45 FCC 2d 764 (1974); *Community TCI of Missouri, Inc.*, FCC 74-95, 45 FCC 2d 133 (1974); *Valley Cable Vision, Inc.*, FCC 73-1246, 44 FCC 2d 232 (1973); *See-Mor Cable TV of Sikeston, Inc.*, FCC 73-796, 42 FCC 2d 261 (1973); *Fort Smith TV Cable Co.*, FCC 73-151, 39 FCC 2d 573 (1973).

the orderly integration of cable television service into the national communications structure. The strong presumption that this integration cannot take place without "distant" independent signals must prevail over Pappas's speculative statements that the proposed cable television service would be inimical to the public interest.

(c) Consolidation of certificate of compliance applications is a matter of Commission discretion. *Lake County Cable TV, Inc.*, FCC 73-927, 42 FCC 2d 952 (1973). While elements of the Clovis and Madera applications are in common with other pending applications for the San Joaquin Valley, the other applications also present different issues. Moreover, our interests in the orderly and economical conduct of the Commission's business generally requires that applications be processed in the order filed. Several of the applications were filed more than a year apart, and we do not believe consolidation, in this instance, would serve the public interest. Regarding cumulative impact, Pappas has always had the option of arguing that the cumulative effect of granting the subject applications and other potential grants would be severe. Such a showing has not been made.

[345] (d) The relief granted KAIL, modified in this decision, was designed to protect a specialized Spanish language station against competition from a satellite broadcasting in the same language. We have limited that protection to KAIL's market, as defined by its specified zone, pursuant to paragraph 23 of the *Reconsideration of Cable Television Report and Order*, FCC 72-530, 36 FCC 2d 326, 335 (1972).¹¹

¹¹ Paragraph 23 states, in part, that: "We are attempting to encourage the carriage of foreign language programming. Where there is a local Spanish language station, it will, of course, get carriage priority."

However, we rejected the station's request that Fresno Cable be precluded from carrying the "distant" independent signals.

We are not without concern for KMPH's losses and attempts to succeed.¹² In our initial decision, we relaxed the requirements of Section 76.54 of the Rules to enable the station to more easily establish that it is significantly viewed and entitled to "must carry" status in Fresno County. However, we do not believe that the station would be significantly aided or that the public interest would be served by our imposing severe restrictions on cable television systems located outside of KMPH's specified zone.

In view of the foregoing, the Commission finds that partial reconsideration of its decision in *Fresno Cable TV Co., Inc.*, FCC 74-845, 48 FCC 2d 116 (1974) is in the public interest.

Accordingly, IT IS ORDERED, That the "Petition for Reconsideration" filed by Spanish International Communications Corporation, licensee of Station KFTV, IS GRANTED, to the extent indicated in paragraph 4, above, and in all other respects, IS DENIED.

IT IS FURTHER ORDERED, That the "Petition for Partial Reconsideration" and "Reply," filed by Pappas Television, Inc., licensee of Television Broadcast Station KMPH, ARE DENIED.

¹²Examination of KMPH's most recent confidential financial report indicates, however, a substantial improvement in its cash flow.

IT IS FURTHER ORDERED, That the "Opposition of Fresno Cable TV Co.," proposed operator of cable television systems at Clovis and Madera, California, IS GRANTED, to the extent indicated above, and in all other respects IS DENIED.

Federal Communications Commission,
Vincent J. Mullins, *Secretary*.

[57 F.C.C.2d 134]

F.C.C. 75-1373

[134] **BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In Re Applications of)	
Fresno Cable Television)	
Company, Inc., Fresno,)	
California	)	CAC-01831,
	)	CA565, CSR-333
Fresno Cable Television	)	CAC-01896,
Company, Inc. Specified	)	CA366
Unincorporated Areas of)	
Fresno County, California)	
For Certificates of Compliance)	

MEMORANDUM OPINION AND ORDER

(Adopted: December 16, 1975; Released:
December 31, 1975)

**BY THE COMMISSION: COMMISSIONER QUELLO
CONCURRING IN THE RESULT.**

1. Fresno Cable Television Company, Inc., (hereinafter Fresno Cable) has filed the above-captioned applications for certification to commence cable television operations at the City of Fresno and in unincorporated portions of Fresno County adjacent to the cities of Fresno and Clovis, California.¹ Fresno

¹ All of the areas to be served are located within the specified zone of the Fresno, California, major television market (#72). Fresno has a population of 165,972 (1970 census).

Cable proposes to offer subscribers the following television broadcast signals:

KAIL² (Ind., Channel 53) Fresno, California
KFSN-TV (CBS, Channel 30) Fresno, California
KJEO (ABC, Channel 47) Fresno, California
KMJ-TV (NBC, Channel 24) Fresno, California
KFTV (Span. Lang., Channel 21) Hanford, California
KTVU (Ind., Channel 2) Oakland, California
KTXL (Ind., Channel 40) Sacramento, California
KQED (Educ., Channel 9) San Francisco, California

Carriage of these signals is consistent with Section 76.63 of the Commission's Rules. Both of the applications are opposed by Pappas Television, Inc., licensee of Television Broadcast Station KMPH (Ind., Channel 26) Tulare, California.³ In addition, Capital Cities Broadcasting Corporation, licensee of Station KFSN-TV (CBS, Channel 30), Fresno, California, has filed a "Petition for Special Relief" directed against the application for the City of Fresno, San Joaquin Cable TV, an applicant for a franchise from the City of Fresno, has filed comments and various other pleadings relating to the application for the City of Fresno.

[135] 2. In its opposition, Pappas states that the applications are procedurally defective in that 1) Fresno Cable has not assured that separate access channels will be provided to each community, as required by Section 76.251 of the Rules; 2) Fresno Cable's equal

² Currently dark.

³ Camellia City Telecasters, Inc., licensee of Television Broadcast Station KTXL (Ind., Channel 40) Sacramento, California, also filed, but subsequently withdrew, objections to both applications.

employment policy statement is inadequate; and 3) its affidavit of service is unverified. Substantively, Pappas requests that certification be conditioned upon carriage of KMPH and non-carriage of any other distant independent television station. In support of this request, Pappas argues that while Fresno is located beyond the specified zone of the Tulare television market, KMPH nonetheless casts a predicted Grade A signal over Fresno and therefore is a "local station" having an affirmative obligation to serve the community and a concomitant right to be carried. Moreover, states Pappas, the unique and competitive nature of the Fresno market, coupled with the financial insecurity of KMPH, warrants Commission action insulating that station from competition by the distant independent signals Fresno Cable proposes to import. The dilution in audience strength that would be caused by this competition would only serve to aggravate KMPH's already precarious position, avers Pappas, and would delay the time at which the station could commence significant local program production. Pappas states that many other communities within its predicted Grade A contour either have or soon will have cable systems carrying imported independent signals, and that "[e]ven without precise impact statistics, only one conclusion can be drawn from this pattern of CATV development in Station KMPH's service area: a new independent television station already operating on the financial edge will be adversely affected. . . ."

3. In its "Petition for Special Relief," Capital Cities Broadcasting Corporation requests that an order be issued to prohibit the importation of any signal "neither local to the Fresno market nor significantly viewed" in Fresno County. Capital Cities states that the

Fresno market is unique among second-fifty major television markets in the number of competing television stations; that the rationale underlying the second-fifty carriage rules (Section 76.63) fails since the market is served by as many independent as network stations; that it is confronted with a "plainly formidable task" in attempting to achieve the audience share necessary to become viable; and that the exclusivity protection afforded to stations in the second-fifty markets by Section 76.151 of the Rules is not sufficient to protect it.

4. In reply, Fresno Cable, addressing the procedural arguments of Pappas, states: (1) that separate access channels will be offered for each area; (2) that the equal employment statement is adapted from the standard program used by Fresno Cable's parent, and the word "station" was inadvertently retained in some instances; and (3) that Pappas does not contend that it was not served with copies of the application. Turning to the substantive issues, Fresno Cable states that: (1) Pappas and Capital Cities have failed to meet the substantial burden imposed on those seeking "ad hoc modification of the Commission's signal carriage Rules"; (2) the Fresno market is not unique since the second independent station, KAIL, operates only 30 hours per week with an authorized power of 16.1 kw visual and 2.14 kw aural; (3) the Commission expressly declined to limit signal carriage in second-fifty markets when it adopted the syndicated program exclusivity [136] rules (Section 76.151); (4) in comparison to other UHF stations, KMPH and KFSN-TV appear to be doing quite well; (5) Commission adoption of Pappas's proposal would preclude cable television development in all markets where a UHF station is losing money; and (6)

the Commission has concluded that two signals not otherwise available in the community are the minimum amount of new service needed to attract large amounts of investment capital for construction of new cable systems.

5. Pappas's procedural arguments are without merit. Fresno Cable's employment statement is in compliance with Section 76.311 of the Rules, and Section 76.13(a)(6) only requires that an applicant submit a certificate of service. Turning to the signal carriage issues, we note that we have previously considered the competing interests in detail. In *Fresno Cable TV Co., Inc.*, FCC 74-845, 48 FCC 2d 116, *recons. granted in part*, FCC 74-1396, 50 FCC 2d 340 (1974), *stay denied*, FCC 75-360, 52 FCC 2d 249 (1975),⁴ and in *Hanford Cable Co.*, FCC 74-844, 48 FCC 2d 132 (1974), *recons. granted in part*, FCC 74-1395, 50 FCC 2d 351 (1974),⁵ we found that KMPH was in need of some relief. Accordingly, we waived portions of Section 76.54 of the Rules to enable the station to establish its status as significantly viewed in Fresno County more easily. We stated that Pappas should submit the certified results of all independent professional audience surveys used to demonstrate viewing strength, and that "[i]f, upon review of those results, we find KMPH is 'significantly viewed' in a county [i.e., that the station has a share of viewing hours of at least 2 percent (total week hours), and a net weekly circulation of at least 5 percent in that county], we will afford the station mandatory signal carriage rights on all cable systems

⁴ *App. pending sub nom. Pappas Television, Inc. v. FCC & USA*, Civil No. 75-1116 (D.C. Cir. filed February 11, 1975).

⁵ *App. pending sub nom. Pappas Television, Inc. v. FCC & USA*, Civil No. 75-1115 (D.C. Cir. filed February 11, 1975).

operating or proposing to operate in that county." Pappas has submitted surveys which satisfy our criteria and establish that KMPH is significantly viewed in several counties, including Fresno.⁶ The station is, therefore, a "must carry" pursuant to Section 76.61(a) (5) of the Rules, and we will sua sponte waive the procedural requirements of Sections 76.18 and 76.25 and require Fresno Cable to add KMPH to its proposed signal carriage complement without requiring further public notice. *Compare New Worlds Cable TV, Inc.*, FCC 75-332, 52 FCC 2d 301 (1975).

6. We will not, however, preclude Fresno Cable from carrying "distant" independent signals consistent with our Rules. As stated in *Fresno Cable TV Co., Inc.*, and *Hanford Cable Co.*, *supra*, parties seeking to impose restrictions upon carriage of otherwise permissible signals are faced with a substantial burden; absent a "substantial showing," we will not deviate from the "go, no-go" concept of the carriage rules. Clarifying these points, we held that any showings must contain specificity of fact and demonstrate that the proposed cable television service will adversely affect the station's revenues to an extent that impairs its ability to serve the public interest. Without such precise impact statistics, we are reluctant to handicap a new cable television system by denying it "the minimum amount of new service [137] needed to attract large amounts of investment capital for the construction of new systems . . . to open the way for the full development of cable's potential." Paragraph 90, *Cable Television Report and Order*, FCC 72-108, 36 FCC 2d 143, 178 (1972). Each station shows a steadily improving financial posture, and since neither Pappas nor Capital

⁶ *Pappas Television, Inc.*, FCC 75-221, 51 FCC 2d 745 (1975).

Cities has timely submitted the requisite detailed impact analysis, their requests will be denied.⁷

7. The franchise for portions of Fresno County (CAC-01896) was issued in 1968, and varies from the standards of Section 76.31 as follows: while the franchise itself does not indicate that it was awarded in a full public proceeding affording due process, a letter from Robert M. Wash, County Counsel, assures that it was; the franchise provides for a twenty year term, but our certification will only extend until March 31, 1977; the franchise does not state that rate increases will only be approved in public proceedings, but the applicant assures us that no rate increases will be made except after such a proceeding; the franchise does not set forth service procedures, but Fresno Cable avers that it will maintain a local office with competent employees and will correct malfunctions "as soon as possible." Finally, the franchise requires a fee of 5% of gross subscriber receipts or \$5,000, whichever is greater, for the first year of operation, and \$5,000 or 5-1/2% of gross receipts subsequently. Only substantial compliance with Section 76.31 of the Rules must be demonstrated for franchises granted before March 31, 1972, and, measured by the criteria established by *CATV of Rockford, Inc.*, FCC 72-1005, 38 FCC 2d 10 (1972), *recons. denied*, FCC 73-293, 40 FCC 2d 493 (1973), we find that the franchise substantially complies with Section 76.31 of the Rules in a manner sufficient to

⁷On November 26, 1975, Pappas submitted the "Cooper Study," which purports to analyze the impact of two imported independent stations on KMPH's revenues. Because the study was filed more than two and one half years after the pleading cycle on the impact issue had been completed it will not be considered in this proceeding. However, since it addresses the entire Fresno area of dominant influence, it will be treated separately as a petition for special relief.

justify a grant of the application until March 31, 1977.⁸

8. The franchise for the City of Fresno (CAC-01831) initially required a payment of \$50,000 to the City by the cable system "in consideration of the granting of this franchise." Further, Fresno Cable was required to pay \$20,000 the second franchise year and \$30,000 (or 5-1/2% of gross receipts) for the third year, and each year thereafter (reduced by the City Council in 1969 to \$10,000 after the third franchise year). Since a total of \$155,000 in the nature of a lump sum payment was remitted to the City before operations commenced, the applicant was required to explain to the Commission how the amount paid is in substantial compliance with the terms of Section 76.31(b) of the Rules⁹ or, in the alternative, to submit a franchise consistent with the requirements of Section 76.31. On August 11, 1975, Fresno Cable forwarded a copy of Ordinance No. 75-81, designated as the Cable [138] Television Ordinance of the City of Fresno, and amendments to the original franchise which incorporate the new ordinance. Shortly thereafter, it forwarded a copy of an agreement between it and the City wherein the City

⁸The franchise also sets technical standards and, at Section 8 ("Uses Permitted"), states "This license shall not be construed as a... permit to transmit any special program... in the manner commonly known and referred to as 'paid television....'" The Commissioner, however, has preempted both areas. See *Report and Order in Docket 20018*, FCC 74-1168, 49 FCC 2d 470 (1974); and *Lake County Cable TV, Inc.*, FCC 73-927, 42 FCC 2d 952 (1973).

⁹That Section provides, in pertinent part, that:

- (b) The franchise fee shall be reasonable (e.g., in the range of 3-5 percent of the franchisee's gross subscriber revenues per year from cable television operations in the community (including all forms of consideration, such as initial lump sum payments)).

agrees to return the \$155,000 "[w]ithin sixty (60) days following the commencement by Grantee of CATV service to one or more subscribers in the City of Fresno. . . ."

9. On September 11, 1975, San Joaquin Cable TV (San Joaquin), "an interested party in this matter by virtue of the fact that it is an applicant for a cable television franchise from the City of Fresno," filed "Comments Concerning Amendment to Application." In its comments (and its later supplements), San Joaquin contends that: 1) The permittee of translator K59AE, Fresno, and the permittee of Television Broadcast Station KMTF, Fresno, have not been served pursuant to Section 76.13(a)(6), nor has Fresno Cable indicated an intention to carry the latter; 2) Not all of the "franchise documents" mentioned in Section 1 of the franchise amendment have been submitted for Commission inspection, as required by paragraph 55 of the *Clarification of Rules and Notice of Proposed Rule Making*, FCC 74-384, 46 FCC 2d 175, 191 (1974); 3) The substantially amended franchise is not in strict compliance with the provisions of Section 76.31 in that:

(a) there is no evidence that the amendment was made in a full public proceeding affording due process, nor does it appear that the City has approved the various transfers of ownership of Fresno Cable or the financial qualifications of the present owners, and this is necessary since the substantial amendments completely terminated the old franchise;

(b) even if portions of the franchise are found to be preempted by the Commission, Fresno Cable remains contractually bound, pursuant to ordinance Section 6-216(a), contrary to the Commis-

sion's policy as stated in paragraph 55 of the *Clarification, supra*:

(c) Fresno Cable is required to disclose rates it may charge for specialized programming, which "has an inhibiting [effect] on the system's freedom of activity in these areas";

(d) Section 6-205(c)(3) of the ordinance enforces technical standards, in violation of the preemption announced in *Report and Order in Docket No. 20018*, FCC 74-1168, 49 FCC 2d 470 (1974);

(e) Section 6-216(b) states only that Commission amendments to Section 76.31 may, in the Council's discretion, be incorporated into the franchise (while Section 76.31(a)(6) requires that the amendments shall be so incorporated);

(f) Section 6-212 appears to permit City regulation of all rates;

(g) the franchise requires a free government channel beyond the five year limit established by the Commission; and

(h) the promise by the City to repay the \$155,000 is conditional.

Finally, San Joaquin states that it has applied for a franchise from the City which it will forward when granted. It notes that it has filed an application for certificate of compliance with the Commission and requests that its application be acted upon simultaneously with Fresno Cable's since "the bulk of applicant's franchise is now before the Commission [in the form of the City's new ordinance]," and states that [139] failure to do so, in the event the City grants a franchise, "would give Fresno Cable an unfair competitive advantage, inconsistent with the City's decision to grant a franchise to both parties."

10. Pappas also has responded to the amendments. It states that since fundamental changes in the ordinance were made, the City was obligated to solicit new applications and to allow "the public as well as prospective applicants an opportunity to participate in the awarding of the new and more attractive franchise." It argues that the failure to do so was discriminatory, citing *Springfield Television, Inc. v. Springfield Mo.*, 462 F.2d 21 (8th Cir. 1972). It states that the 1966 franchise was non-exclusive while an amendment now provides that "competitive franchises covering the same territory shall be restricted to those instances where the applicant for the second franchise can offer a unique or legally protected service which is not available and cannot be made available to the grantee of the existing franchise."

11. In reply, Fresno Cable recites the lengthy history of its attempts to begin cable service at Fresno. It states that in December 1966, it filed, pursuant to former Section 74.1107,¹⁰ a petition for waiver of the evidentiary hearing mandated by that Rule. The request was denied, and a hearing was designated (*Fresno Cable*

¹⁰That Section provided, in pertinent part, that:

No CATV system operating in a community within the predicted Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the Grade B contour of that station, except upon a showing approved by the Commission that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. . . .

TV Co., Inc., FCC 68-401, 12 FCC 2d 338 (1968)). Before the hearing commenced, however, the Commission suspended all pending top-100 market hearings pursuant to *Notice of Proposed Rulemaking and Notice of Inquiry in Docket 18297*, FCC 68-1176, 15 FCC 2d 417 (1968), and the proceeding was terminated on July 31, 1972. Fresno Cable applied again, this time under new rules, but, in response to a Commission inquiry, was unable to establish that the large lump-sum payments made to the City were within the established zone of "substantial compliance" with Section 76.31(b). The City therefore instituted proceedings looking to the adoption of franchise documents fully consistent with the Commission's standards, which culminated in the new ordinance and amended franchise. Fresno Cable contends that Pappas's involvement in the franchise issue is improper since KMPH is not licensed to a community within the Fresno market and, indeed, is more than 35 miles from Fresno; that the most recent amendments did not, in fact, result in a new franchise but merely an amended one; and that *Springfield Television, Inc.* is distinguishable. Finally, it states that the "other franchise documents" referred to in the franchise date back to 1966, and are neither relevant nor material to the application, but will be submitted if required.

12. Mr. R. W. Hanley, Chief Administrative Officer of the City of Fresno, has also replied to the oppositions. Mr. Hanley states that the amendments to the franchise were adopted after full public proceedings affording due process; that notices preceding their discussion in both the Council workshop of July 3, 1975, and the regular meeting of [140] July 31, 1975, were given in local newspapers; that copies of all

documents discussed were available in the City Clerk's office and that representatives of both San Joaquin Cable TV and Pappas Television participated. He further states that the City recognizes the broad scope of the Commission's regulatory authority over cable television, and that the City has "no intention of intruding into areas encompassed by the Commission's regulations and policies except to the extent allowed by law," as indicated by Section 6-216(a) of the ordinance. He states that the City will not bind Fresno Cable, contractually or otherwise, to provide services, equipment or operations inconsistent with Commission requirements; that it has no intention of regulating rates charged for specialized services; that it recognizes the Commission's preemption of technical standards; that it will incorporate into the franchise all Commission modifications of Section 76.31 which are mandatory, and that the operation of the government access channel will be in accordance with Commission requirements. Mr. Hanley concludes by saying "we respectfully request that the Commission find the city's ordinance sufficient to support the issuance of a certificate of compliance based thereon. Since 1966, Fresno Cable has been the party designated by the City of Fresno to operate a cable television system in this City, and we have recently reaffirmed our intention to honor that franchise."

13. None of the matters discussed by San Joaquin or Pappas preclude our awarding a certificate of compliance to Fresno Cable. We will address the arguments *seriatim*:

(1) David W. Wilkinson, present permittee of translator K59AE, and the Fresno County Board of Education, permittee of Television Broadcast Station

KMTF, were not awarded construction permits until long after Fresno Cable's application was filed. Accordingly, neither was entitled to service pursuant to Sections 76.13(a)(6) or 1.65. Fresno Cable is not required to request certification of KMTF since that station is a "must carry" only upon its request, and we are not aware that such a request has been made;

(2) We stated at paragraph 55 of the *Clarification, supra*, that we would review all franchise provisions that are enforceable against the franchisee for consistency with the Rules, including those incorporated by reference, "particularly for extra services or equipment." The "franchise documents" involved herein include nine items, most of which (The Notice Inviting Offers and Applications for CATV Franchise; The Instructions to Offeror—Applicants for CATV Franchise; The Form of Offer and Application for CATV Franchise; The Notice of Receipt by City; the Written Acceptance of CATV Franchise) date back to 1966. The City's purpose in adopting the new ordinance and deleting the old (including the regulations issued thereunder) was to bring the franchise into compliance with our Rules, and the City's Chief Administrative Officer emphasizes that intention. The City has not disputed Fresno Cable's contention that the documents which have not been forwarded are irrelevant for Commission purposes, nor has San Joaquin presented any evidence suggesting this is not the case. Nevertheless, out of an abundance of caution, we will expressly state our intention to treat as preempted any provision of the franchise [141] documents inconsistent with our Rules. See *Arlington Telecommunication Corp.*, FCC 75-670, 53 FCC 2d 757 (1975).

(3)(a) We will not repeat in full our often stated

expectations regarding the nature of our public proceeding requirement. See *Cablevision of Durham*, FCC 75-535, 52 FCC 2d 1128 (1975); *Lynchburg Cablevision, Inc.*, FCC 75-41, 50 FCC 2d 797 (1975); *Calvert Telecommunications Corp.*, FCC 74-1095, 49 FCC 2d 200 (1974). Suffice it to say that:

Our present requirement for public proceedings is administered on the basis of a "reasonable man" standard. So long as the public has been given a reasonable opportunity to participate in the franchising process, we currently consider our "public proceeding" requirement as having been met. We presume the regularity of action by local officials. Except in the extraordinary case, if local officials assure us that they have made appropriate investigations of the franchisee's qualifications and that the public has had an opportunity to participate in the process we will not delve further into the particular methodology or decision factors in any specific franchise grant. *Clarification, supra*, at paragraph 51.

The undisputed representations of Fresno's Chief Administrative Officer satisfy our requirements. Presumably any questions as to the qualifications of Fresno Cable's current owners would have been raised by San Joaquin's or Pappas's representatives and resolved at the public hearings. As to Fresno Cable's changed ownership, we have no requirement at this time that transfers of control be made only after full public proceedings.¹¹ But it would be difficult to view the statements of the Chief Administrative Officer and the act of substantially amending the old franchise as

¹¹See paragraphs 80-81, *Clarification, supra*, at 198-99, in which the Commission stated that it had no firm rules in this area and invited comments (Docket No. 20023).

less than an endorsement of the present owners.¹² Finally, we note that this was not an *ab initio* award proceeding, but rather a proceeding involving amendment of an existing franchise. See *Central Plains Cable TV, Inc.*, FCC 75-266, 51 FCC 2d 904 (1975).¹³

(b) Section 6-216(a) of the franchise purports to make contractual in nature "any and all minimum standards governing the operation of the grantee and any and all maximum rates, ratios and charges," and as such contractually binding in the event of a subsequent federal or state preemption. However, in his letter, the Chief Administrative Officer specifically states the City's intention not to contractually bind Fresno Cable to services, equipment or operations inconsistent with the Rules. And while we find the provision potentially troublesome, any detailed analysis of its effect or application at this time, absent specific action by the City, would be conjecture;

(c) We do not find this requirement objectionable, especially since we have approved contingency clauses

¹²*Springfield Television*, cited by Pappas, is not relevant. There the court found that a cable television franchise ordinance could not be awarded pursuant to the City charter except after a vote by the City electorate. Pappas has not proffered a similar requirement in Fresno's charter. Moreover, we do not agree that the new franchise ordinance is necessarily exclusive. The City is apparently considering San Joaquin's application and the latter, obviously, does not believe its efforts are in vain.

¹³On December 9, 1975, San Joaquin notified the Commission that a suit had been filed in the Superior Court of California for Fresno County challenging the validity of the amendments made to Fresno Cable's franchise. The fact that such suit is pending does not alter our presumption of regularity which attaches to acts by the franchising authority. Our treatment of the amendments as valid is, of course, subject to any subsequent judicial determination to the contrary. See *Cable Antenna Systems*, FCC 74-646, 47 FCC 2d 545 (1974).

in franchises whereby the franchising authority may apply its fee against income from specialized [142] services should the Commission alter its present policy (See *Clarification, supra*, at part. 97);

(d) That section merely requires the franchise to describe its proposed system and, as a minimum standard, to comply with the requirements of the Commission's technical standards;

(e) We believe the statements of the Chief Administrative Officer assure that any necessary franchise changes will be made;

(f) That section requires council approval of all rates and charges. It will be treated as preempted to the extent it applies to other than fees from ordinary subscriber services. See *Clarification, supra*, at paras. 84, 85.

(g) We do not believe this provision is inconsistent with Section 76.251(a)(10) since both require a free government channel for five years. The franchise expires December 31, 1979, and the requirement will be examined at that time for consistency with our Rules;

(h) When Fresno Cable begins serving subscribers, the money will be refunded. Should it not, for some reason, serve subscribers, the Commission's interest in the matter would end, since Fresno Cable would then not come within our definition of a cable system. See Section 76.5(a).

14. We do not believe any further delay in issuing Fresno Cable a certificate of compliance is in the public interest. Our general policy is to process competing applications simultaneously, but only where both are ripe for processing. See *Lake County Cable Communica-*

tions, FCC 73-927, 42 FCC 2d 952 (1973). We will not act on an application if local processes have not been completed. See *Telco Cablevision*, FCC 75-168, 51 FCC 2d 578 (1975). *Wells Cable TV*, FCC 75-216, 51 FCC 2d 607 (1975). In a letter to San Joaquin's president dated September 24, the Chief Administrative Officer advised that the franchising procedure "may be completed by November 30, 1975." On November 20, San Joaquin stated negotiations were proceeding apace, that it would know if it would receive a franchise by December 18, and that "the actual franchise may be before the Commission by the middle part of January."¹⁴ Assuming a franchise is awarded and is forwarded for Commission inspection, we will act upon San Joaquin's application as rapidly as possible consistent with our other regulatory responsibilities. Fresno Cable on the other hand has submitted an amended franchise in strict compliance with Section 76.31 of the Rules, and its application is now ripe for grant. In these circumstances, we cannot withhold certification to Fresno Cable based on allegations of competitive economic disadvantage.¹⁵

In view of the foregoing, the Commission finds that grant of the above-captioned applications for certification is consistent with the public interest.

¹⁴The City Attorney has since advised that assuming the application is not rejected, "the earliest the public hearing could be held would be January 26, 1976." He offers the caveat that "[a]ctual processing time could be much longer...."

¹⁵This is not a case where the Commission is asked to waive strict compliance with one of the franchise standards so that a newly-franchised cable system may operate on equal footing with a "grandfathered" competitor. Compare, *Twin County Trans-Video*, FCC 75-93, 50 FCC 2d 1147 (1975); *A. N. Cable TV Company, Inc.*, FCC 73-830, 42 FCC 2d 291 (1973).

Accordingly, IT IS ORDERED, That the "Application[s] for Certification," filed by Fresno Cable Television Company, Inc., (CAC-01831, [143] 1896) ARE GRANTED, and appropriate certificates of compliance will be issued.

IT IS FURTHER ORDERED, That the "Petition for Special Relief," (CSR-333) filed by Capital Cities Broadcasting Corporation, licensee of Station KFSN-TV (CBS, Channel 30) Fresno, California, IS DENIED.

IT IS FURTHER ORDERED, That the "Objection to the Applications for Certificates of Compliance" and supplements thereto, filed by Pappas Television, Inc., licensee of Television Broadcast Station KMPH, (Ind., Channel 26) Tulare, California, IS DENIED.

IT IS FURTHER ORDERED, That the "Comments Concerning the Amendment to Application" and supplements thereto, filed by San Joaquin Cable TV, proposed operator of a cable television system at Fresno, California, ARE DENIED.

Federal Communications Commission,
Vincent J. Mullins, *Secretary*.

[60 F.C.C.2d 198-201]

F.C.C. 76-649

[198] **BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In Re Applications of)	
Fresno Cable Television)	
Company, Inc., Fresno,)	
California	)	CAC-01831,
	)	CSR-333
Fresno Cable Television	)	(CA0565)
Company, Inc., Specified	)	CAC-01896
Unincorporated Areas of	)	(CA0366)
Fresno County, California	)	CAC-05821
San Joaquin Cable TV, Inc.,	)	(CA0686)
Fresno, California)	
For Certificates of Compliance)	

MEMORANDUM OPINION AND ORDER

(Adopted: July 7, 1976; Released: July 20, 1976)

**BY THE COMMISSION: COMMISSIONER ROBINSON
ABSENT.**

1. Pappas Television, Inc., licensee of Television Broadcast Station KMPH (Ind., Channel 26), Tulare, California, (hereinafter Pappas) seeks a stay of two Commission orders: *Fresno Cable Television Company, Inc.* (Fresno, California), FCC 75-1373, 57 FCC 2d 134 (1975) and *San Joaquin Cable TV, Inc.* (Fresno, California), FCC 76-444, 59 FCC 2d ____ (1976). Although the petitions were filed separately, they are worded in essentially identical language and request the

same relief. Accordingly, they will be considered jointly.

2. In *Fresno Cable* the Commission granted certificates of compliance to Fresno Cable Television Company, Inc. (hereinafter Fresno Cable) to operate cable television systems at Fresno, California, and at specified unincorporated areas of Fresno County surrounding Fresno. Included in the authorized signal complement were Television Broadcast Stations KTVU (Ind., Channel 2), Oakland, California, and KTXL (Ind., Channel 40), Sacramento, California, whose carriage was found to be consistent with Section 76.61(b) of the Commission's Rules. The Commission denied the objection of Pappas, finding that it had not submitted in a timely manner the detailed impact analysis required of one seeking to restrict cable carriage of signals consistent with the Rules. It noted that the "Cooper Study," which purports to analyze the [199] impact of two imported independent stations by cable systems in the Fresno area of dominant influence on KMPH's revenues, was filed more than two and one-half years after the pleading cycle on the impact issue had been completed and would not therefore be considered in the Fresno Cable certificating proceeding. However, it stated that since the petition addressed the entire area of dominant influence, it would be considered separately as a petition for special relief. Pappas filed a petition for review of the Commission's decision on January 6, 1976. *Pappas Television, Inc. v. FCC*, Civil No. 76-1010 (D.C. Cir., filed January 6, 1976). Subsequently, San Joaquin Cable TV, Inc., (hereinafter San Joaquin) perfected its pending application for certification to operate a cable television system at Fresno. Included therein was a request for certification

of the signals of Television Broadcast Stations KTVU (Ind., Channel 2), Oakland, California, and KBHK-TV (Ind., Channel 44), San Francisco, California. Pappas opposed the application, including in its opposition a request that the application be consolidated with the Cooper Study proceeding which, by this time, had been designated CSR-962 and was being processed as a petition for special relief. The Commission declined to consolidate the two proceedings. It found that by its own terms the Cooper Study is not limited to the City of Fresno, but speaks to and requests relief in the entire area of dominant influence. Since many of the cable systems in the area were participating in the special relief proceeding, causing various procedural delays, the Commission found that "withholding of certification to San Joaquin until the Commission completes its analysis of and makes determinations upon all the pleadings in that proceeding could place San Joaquin at a competitive disadvantage with previously-certified Fresno Cable." The Commission noted that San Joaquin would be subject to any relief afforded Pappas in CSR-962, and issued the requested certificate of compliance. Pappas appealed the Commission's decision in *Pappas Television v. FCC*, Civil No. 76-1494 (D.C. Cir., filed June 2, 1976).

3. In its petition for stay of *Fresno Cable*, Pappas states that the Commission's failure to consider the Cooper Study while granting authority for carriage of KTXL and KTVU denied Pappas a full and impartial hearing; that Pappas demonstrated that importation of distant independent signals would lead to curtailment of local service, thereby threatening it with immediate harm; that a "roll-back" of service that may result from the special relief proceeding is contrary to stated

Commission policy; that it is seeking to restrict carriage of only the distant independent signals pending judicial review; and that no competitive disadvantage will result since it is also opposing carriage of independent signals on San Joaquin's system. Pappas repeats the arguments in its petition for stay of *San Joaquin*.

4. In its "Opposition to Petition for Stay," Fresno Cable notes that Pappas did not file its petition for stay until five months after release of the Commission's decision and the filing of the petition for review. It states that such conduct amounts to laches, barring a grant of the requested relief. It contends that Pappas is not likely to prevail in its petition for review and that the Commission's refusal to consider the late-filed Cooper Study in Fresno Cable's certification proceeding was correct. To do otherwise, states Fresno Cable, would have been grossly [200] unfair and injurious. Moreover, no demonstration of economic injury is before the court of appeals, states Fresno Cable, since the attempted showing is contained in the Cooper Study, upon whose merits the Commission has not yet ruled; therefore, Pappas has not demonstrated irreparable injury.

5. San Joaquin has filed in opposition to Pappas's petition for stay of the Commission's decision in *San Joaquin Cable TV*. It states (a) a stay would adversely affect the public interest and San Joaquin since without distant independent signals, it might not be able to construct its system, and even if it constructs, the absence of such signals during its developmental stages when it is incurring substantial expenses would be particularly harmful; (b) Pappas will only prevail on the merits of its appeal if it is able to demonstrate that the Commission erred in failing to consolidate San

Joaquin's certificate application with CSR-962—the Cooper Study—a happening that is most unlikely; (c) it is evident that Pappas is not faced with irreparable injury since more than five months passed from the date of Commission certification of Fresno Cable to Pappas's filing of the petition for stay, and (d) a stay should be granted only in the most compelling circumstances, none of which have been documented by Pappas.

6. A fourfold showing is required before grant of a request for stay; the petitioner must demonstrate: (1) a likelihood of success on the merits of a petition for appeal; (2) failure to grant a stay would cause irreparable injury to the petitioner; (3) grant of the stay would not harm other interested parties; and (4) the stay would be in the public interest.¹ Pappas has not demonstrated a likelihood of success on the merits of its appeal. Fresno Cable's application was ripe for grant, and we do not believe the court of appeals would find the Commission's failure to consider a pleading filed more than two and one-half years late which would have substantially delayed that proceeding error, especially since the delay could have substantially prejudiced the rights of Fresno Cable. Similarly, since the Cooper Study does not direct its analysis to the City of Fresno, but instead speaks to the entire area of dominant influence, we do not believe the court would find our decision in *San Joaquin* to examine the matter in a special relief proceeding, with all affected parties being given a chance to be heard, improper, especially in view of the competitive situation in the City of Fresno.

¹See *Fetzer Cablevision* (Kalamazoo, Michigan), FCC 75-261, 51 FCC 2d 933 (1975).

7. Moreover, Pappas has not demonstrated irreparable injury if a stay is not granted. We expressly stated in *San Joaquin* that the cable system would be subject to any relief afforded Pappas in the special relief proceeding. In the event that either or both cable systems are constructed and operational prior to the resolution of that matter, with any necessary microwave arrangements completed, and the system decides to carry the distant independent signals, such action is taken at its own risk. To state the obvious, our action herein in no way limits the relief, if any, we may provide Pappas after our analysis of the matters raised in CSR-962 is completed. Finally, the grant of a stay at this point would only serve to reward Pappas's dilatory conduct in [201] *Fresno Cable, supra*, and we do not believe such action would be in the public interest.

In view of the foregoing, the Commission finds that grant of the subject petitions for stay would not be in the public interest.

Accordingly, IT IS ORDERED, That the subject "Petition[s] for Stay," filed by Pappas Television, Inc., ARE DENIED.

IT IS FURTHER ORDERED, That the "Opposition to Petition for Stay," filed by San Joaquin Cable TV, Inc., IS GRANTED, to the extent indicated herein, and otherwise IS DENIED.

IT IS FURTHER ORDERED, That the "Opposition to Petition for Stay," filed by Fresno Cable Television Company, Inc., IS GRANTED, to the extent indicated herein, and otherwise IS DENIED.

Federal Communications Commission,
Vincent J. Mullins, *Secretary*.

[59 F.C.C.2d 525-530]

F.C.C. 76-444

[525]

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In Re Application of]	
SAN JOAQUIN CABLE TV,]	
INC., FRESNO, CALIFORNIA	]	CAC-5821
For Certificate of Compliance	]	(CA0686)
]	

MEMORANDUM OPINION AND ORDER

(Adopted: May 12, 1976; Released: May 26, 1976)

BY THE COMMISSION: COMMISSIONER REID
ABSENT; COMMISSIONER WASHBURN CONCUR-
RING IN THE RESULT.

1. San Joaquin Cable TV, Inc. (hereinafter San Joaquin) has filed the above-captioned application for certification to commence cable television operations at the City of Fresno, California.¹ San Joaquin proposes to offer subscribers the following television broadcast signals:

KMFT (C.P., Channel 18) Fresno, California
KFSN-TV (CBS, Channel 30) Fresno, California
KJEO (ABC, Channel 47) Fresno, California
KMJ-TV (NBC, Channel 24) Fresno, California
KAIL² (Ind., Channel 53) Fresno, California

¹The Fresno major market is ranked number 72; the City has a population of 165,972 (1970 census). The cable system will have 27 channels available immediately, and a technical capacity for 38.

²KAIL was granted permission to cease transmission temporarily by the Commission on April 17, 1973. The permission expires June 29, 1976.

KMPH (Ind., Channel 26) Tulare, California
 KFTV (Spec. Sta., Channel 21) Hanford, California
 KBHK-TV (Ind., Channel 44) San Francisco, California
 KEMO-TV (Spec. Sta., Channel 20) San Francisco, California
 KQED (Educ., Channel 9) San Francisco, California
 KTVU (Ind., Channel 2) Oakland, California
 KVIE (Educ., Channel 6) Sacramento, California

Carriage of these signals is consistent with Section 76.63 of the Commission's Rules. The application is opposed by Pappas Television, Inc., licensee of Television Broadcast Station KMPH (Ind., Channel 26), Tulare, California; by Spanish International Communications Corporation, licensee of Station KFTV (Spec. Sta., Channel 21), Hanford, California; by Television Broadcast Station KAIL (Ind., Channel 53), Fresno, California; and by Fresno Cable Television Co., Inc., recently certified by the Commission to operate cable television systems at Fresno and specified unincorporated portions of Fresno County.

2. In its opposition, Pappas states that San Joaquin must not be permitted to import distant independent signals into Fresno since KMPH is dependent upon audience in Fresno and is unable to withstand the competition the independent signals will pose. In support of this contention, Pappas states: a) the Fresno market is a unique sec-[526]ond-fifty market in that six commercial stations place City-Grade signals over Fresno; b) the Commission's continuing concern for the development of UHF stations was evidenced by its recent decision in *Daily Telegraph Printing Company*, FCC 75-1302, 56 FCC 2d 990 (1975), in which it declined to permit a VHF station to relocate its transmitter on grounds of

economic injury to a UHF station; c) San Joaquin's cable system will be successful by providing improved reception, origination programming, access programming, and pay cable, without the distant independent signals; d) the Cooper Study, submitted with Pappas's opposition, establishes "that importation of two distant independent signals will cause a decrease in KMPH's actual revenues of between 11.7% and 13.9%."

3. In its reply to Pappas's petition, San Joaquin states that in *Fresno Cable Television Company, Inc.* (Fresno, California), FCC 75-1373, — FCC 2d — 1975, the Commission granted a certificate of compliance to Fresno Cable Television Company to operate cable television systems at Fresno and surrounding portions of Fresno County. Therein, the Commission refused to consider the Cooper Study, instead deferring it for separate consideration in a special relief proceeding (CSR-962) "since it addresses the entire Fresno area of dominant influence," and authorized Fresno Cable to carry, *inter alia*, two distant independent signals.³ To delay action on San Joaquin's application to consider the Cooper Study in the instant proceeding, states San Joaquin, could give Fresno Cable an insuperable competitive advantage, greatly harming San Joaquin, while Pappas would not be harmed by separate consideration. In any

³ In the cited opinion the Commission stated as follows: On November 26, 1975, Pappas submitted the "Cooper Study," which purports to analyze the impact of two imported independent stations on KMPH's revenues. Because the study was filed more than two and one half years after the pleading cycle on the impact issue had been completed it will not be considered in this proceeding. However, since it addresses the entire Fresno area of dominant influence, it will be treated separately as a petition for special relief. *Id.* at n. 7.

event, states San Joaquin, it should not be denied carriage of imported independents since such signals are vital to its success in that origination and pay-cable are not yet proven revenue sources, and improved reception, because of the general quality of local signals, will be a negligible factor. As to the Cooper Study, San Joaquin states as follows: the study's use of the Bakersfield market to predict what will happen in the Fresno market is without foundation; the in-market non-network "competitors" of KMPH-KFTV and KAIL—will carry Spanish language programming and will not be vying for the same audience; even accepting Pappas's figures, KMPH's market share loss would be 1.6 percentage points, and this loss is outweighed by the benefits of the orderly integration of cable television into the nationwide system of communications; the 11.7 percent cable penetration, even if true, ignores the dynamics of general growth factors in the market such as increases in population, number of TV homes, income per household and retail sales; Commission action at this time based on what may happen in the future should be withheld, since any remedial action could be taken when, indeed if, necessary.

4. In its reply, Pappas requested that its reply pleading filed in the special relief proceeding (CSR-962) be incorporated herein. Subsequently, it asked that San Joaquin's certificate application be consolidated with the special relief proceeding. The request is opposed by San Joaquin, which states that the motion to consolidate was late filed, and that, in any event, consolidation would delay certification of San Joaquin, thereby placing it at a competitive disadvantage with Fresno Cable. It states that San Joaquin's certification can be conditioned on the outcome of CSR-962.

5. We do not believe it appropriate to treat Pappas's special relief petition herein. By its own terms the

Cooper Study is not limited to the City of Fresno, but speaks to and requests relief in the entire area of dominant influence. The various cable systems within this area have responded in the special relief proceeding, and our withholding of certification to San Joaquin until the Commission completes its analysis of and makes determinations upon all the pleadings in that proceeding could place San Joaquin at a competitive disadvantage with previously-certified Fresno Cable. Our separate consideration of these matters will not prejudice Pappas, since San Joaquin will be subject to any relief afforded Pappas in CSR-962. Pappas's petition for consolidation is therefore denied.

6. In its Petition for Special Relief, Spanish International Communications Corporation (SICC) "requests that applicant be prohibited from carrying, on its proposed cable television system in Fresno, California, the signal of KEMO-TV, San Francisco, California." In support of its petition, SICC states the following: since commencing operations in 1972, KFTV has lost, in successive years, \$73,040, \$152,552, \$203,867; as the only Spanish language station in the San Joaquin Valley, its continued viability is of importance to the 222,700 Spanish-speaking residents of the San Joaquin Valley, and the local service it provides will be jeopardized by importation of KEMO-TV from San Francisco, since the City of Fresno accounts for 52 percent of the Spanish-speaking population in KFTV's service area; because its net weekly circulation in the market is only 9000 homes, and Arbitron Television does not attribute any share or rating points to it for any time period, the loss of any households to KEMO-TV would be significant. Finally, SICC states that denying carriage of KEMO-TV would be consistent with the Commission's action in *Big Valley Cablevision, Inc.*, FCC 73-414, 40 FCC 2d 662, *recons.*

granted, FCC 73-1244, 44 FCC 2d 1 (1973), *recons. denied*, FCC 74-947, 48 FCC 2d 648 (1974), *remanded*, *Big Valley Cablevision, Inc. v. FCC*, Civil No. 74-1961 (D.C. Cir., decided January 12, 1976), *Order*, FCC 76-86, — FCC 2d — (1976); and *Fresno Cable TV Company, Inc.*, FCC 75-360, 52 FCC 2d 249 (1975). SICC states that the Commission's goal of diversity will be adequately served by carriage of KFTV.

7. Trans-America Broadcasting Corporation also opposes carriage of the signal of KEMO-TV, which, states Trans-America, "will fragment and reduce to an unacceptable degree the Spanish-speaking audience for KAIL's locally-originated programs in that language." It states that KAIL is currently dark, but that, upon completion of its new transmitter site, will continue to carry "substantial *locally-originated* Spanish programming." In addition, it agrees with Pappas that importation of all distant independent signals should be prohibited. It states that the Fresno market has seven stations licensed to it, that it has [528] suffered income loss in each of the past five years, and that the variety of local service presently available abates the need for cable service.

8. In reply, San Joaquin states that carriage of KEMO-TV is consistent with the Rules; that SICC has not submitted comprehensive financial data which San Joaquin can review and comment upon; that the cases to which SICC refers are not in point; and that the Commission has stated that restrictions on carriage of foreign language stations will only be granted in unusual situations based upon a compelling demonstration by the affected station. San Joaquin concludes that the improved reception of KFTV resulting from cable carriage may well provide benefits outweighing any adverse impact from KEMO-TV, and notes that since KEMO-TV has

also experienced financial difficulties, the equities favor neither station. As to the objections of Trans-America, San Joaquin responds that no specific factual data in support of the requested waivers has been submitted, that no attempt to document the allegations of injury has been made, and that the Commission must reject Trans-America's claims as speculative and unsupported.

9. In *Report and Order in Docket 20553*, FCC 76-189, — FCC 2d — (1976), the Commission had occasion to reassess the matter of cable television carriage of specialty stations, i.e., those stations which appeal primarily to discrete segments of the population with particularized programming interests by carrying programming which, by virtue of its nature or content, is not of general interest to the average viewer. FCC 76-189 at paragraph 24. We expressly found Spanish language programming to be within this category and that, in general, carriage of such programming is in the public interest. But

[W]here the special format programming of the local and distant specialty stations is of basically the same type, however, the unique circumstances pertaining in the individual situation will determine whether the effect of competition on the local specialty station is likely to be critically adverse. Thus, while we shall not limit the carriage of distant specialty stations in markets where there is a local one, we shall entertain petitions for special relief on an *ad hoc* basis. FCC 76-189 at para. 36.

We are unable to conclude from the information before us that carriage of KEMO-TV by San Joaquin in the circumstances pertaining to this situation would be critically adverse to either KAIL or KFTV. Therefore, because our *Memorandum Opinion and Order in Docket 20553* was issued after the pleadings relating to carriage

of KEMO-TV were filed, we will hold in abeyance certification of that station for ninety days from the release date of this opinion to allow all parties to submit supplemental showings, tailored to the standard announced in paragraph 36, *supra*. It is impossible to announce in any comprehensive fashion the entire universe of factors that would support a finding of critically adverse impact, nor do we deem it wise to limit broadcast stations in making their showings by prescribing an inflexible, ironclad formula. The circumstances of each case are different. Here however, we need to know the extent to which KFTV and KAIL would be protected by our network program and syndicated program nonduplication rules. To make this determination, we need to have programming schedules of the stations in question, taken from a typical period of at least two weeks duration. Each program should be identified by language and as network (as denied by Section 76.5(o) of the Rules), syndicated, or other. Secondly, we need information as to both the general market structure and the particular nature of the objecting [529] party's own operations. We would find it helpful for the stations to supply, to the extent possible, the percentage and sources of revenues derived from each type of programming carried and the percentage of revenues derived from prime time programming. This information might include statements as to the trend of retail sales in the market, the ethnic composition of the market and the extent to which each station relies on advertisers in the City of Fresno. We would also like to know the size and type of each station's audience, prime time and 9:00 a.m. to midnight in terms of numbers of households. Data such as balance sheets and income statements, projected costs of programming, and other detailed financial information should be submitted for inspection by the Commission and San Joaquin. Such

evidence will have to be estimated by KAIL since it is presently off-the-air, but we believe it is now aware of the factors to which we will look. *See also* paragraph 26, *Second Report and Order in Docket 19995*, FCC 75-820, 54 FCC 2d 229, 243-44 (1975). It should give a complete accounting of the factors surrounding its decision to temporarily cease operations, and its firm intentions for the future. We emphasize that the burden of demonstrating that carriage of KEMO-TV by San Joaquin will adversely affect the objecting stations' local service falls on the objecting broadcast stations. In the event no supplemental pleadings are submitted, or those submitted fail to demonstrate adverse impact on local service, certification will be issued for carriage of KEMO-TV.

10. Fresno Cable Television Company initially objected to San Joaquin's application on the grounds that no franchise had been submitted, as is required by Section 76.13(a)(3) of the Commission's Rules, and that it could not therefore "be accepted for filing." San Joaquin thereafter amended its application with a franchise, "effective and in full force and effect at 12:01 o'clock a.m. on [April 3, 1976]," thereby mooted Fresno Cable's objections. None of the parties has objected to or otherwise commented upon the franchise as submitted, but San Joaquin observes its franchise is essentially identical to that granted Fresno Cable Television Company which the Commission has considered and approved. In so doing, notes San Joaquin, the Commission relied upon statements made in a letter to the Commission dated October 8, 1975, by the Chief Administrative Officer of the City of Fresno who, in clarifying several points of the franchise, stated that:

The City of Fresno will not hold a cable television franchisee contractually bound to provide services, equipment or operations which are inconsistent with

Commission requirements or standards. In areas preempted by the Commission, the City will not attempt to enforce its franchise (i.e., contract) provisions or otherwise bind the cable system to perform in these areas.

While the matter to which the Chief Administrative Officer was responding had specific reference to only a particular section of the franchise that, in effect, mooted any preemptive action by the state or federal government, we believe the broader interpretation San Joaquin suggests accurately reflects the City's sentiments. We therefore shall not revisit those franchise provisions discussed in *Fresno Cable Television Co., supra*. We note, however, that San Joaquin's application to the City, incorporated by reference into the franchise at Section 2(b)(3) of Ordinance No. 76-21, contains extensive technical standards for both equipment and system operation. While the terms of the proposal [530] do not appear to have been made legally binding commitments, they are not, in any event, enforceable by the City to the extent they are different from the Commission's technical standards. See *Report and Order in Docket 20018*, FCC 74-1168, 49 FCC 2d 470 (1974). We also note that Ordinance No. 76-21 5(b) provides for a "franchise fee for out-of-city operations served by the facilities located over or under City streets, payable quarterly to the City . . . [of] three percent of the basic subscriber receipts from out-of-city operations," a charge apparently not assessed against Fresno Cable. Since any such operations would constitute a separate cable television system pursuant to Section 76.5(a) of the Rules, requiring a separate certificate of compliance, the fee would be reviewed for consistency with Section 76.31(b) when the certificate is sought.

In view of the foregoing, the Commission finds that grant of the above-captioned application for certificate of compliance is in the public interest.

Accordingly, IT IS ORDERED, That the "Application for Certificate of Compliance" filed by San Joaquin Cable TV, Inc. (CAC-5821), IS GRANTED, to the extent indicated herein, and an appropriate certificate of compliance will be issued.

IT IS FURTHER ORDERED, That the "Opposition to Application for Certificate of Compliance and Petition for Special Relief," filed by Pappas Television, Inc., IS DEFERRED for consideration in special relief proceeding CSR-962, pursuant to paragraph 5, *supra*, and otherwise IS DENIED.

IT IS FURTHER ORDERED, That the "Petition for Special Relief," filed by Spanish International Communications Corporation, licensee of Station KFTV, Hanford, California, IS HELD IN ABEYANCE for ninety (90) days from the release date of this opinion, pursuant to paragraph 9, *supra*, and otherwise IS DENIED.

IT IS FURTHER ORDERED, That the "Trans-America Broadcasting Corp. (KAIL) Opposition to Application for Certificate of Compliance" filed by Trans-America Broadcasting Corporation, licensee of Television Broadcast Station KAIL, Fresno, California, IS HELD IN ABEYANCE for ninety (90) days from the release date of this opinion, pursuant to paragraph 9, *supra*, and otherwise IS DENIED.

IT IS FURTHER ORDERED, That the "Motion to Reject or, in the Alternative, Opposition to Request for Special Relief," filed by Fresno Cable Television Company, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

[61 F.C.C.2d 1051-1058]

F.C.C. 76-953

[1051] Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In Re:]
PAPPAS TELEVISION, INC.] CSR-962
Petition for Special Relief]

MEMORANDUM OPINION AND ORDER

(Adopted: October 13, 1976;

Released: November 2, 1976)

BY THE COMMISSION: COMMISSIONER WHITE NOT
PARTICIPATING.

1. On November 26, 1975, Pappas Television, Inc., licensee of Television Broadcast Station KMPH (Ind., Channel 26), Tulare, California, filed the instant petition entitled, "Supplement To Opposition To Application For Certificate of Compliance" ("Cooper Study"). Pappas intended that pleading to supplement its opposition to the Certificate of Compliance applications of Fresno Cable Television Company, Inc., (CAC-01231 and CAC-01896). However, the Commission at footnote 7 of *Fresno Cable Television Company, Inc.* (Fresno, California), FCC 75-1373, 57 FCC 2d 134 (1975) declared:

On November 26, 1975, Pappas submitted the "Cooper Study," which purports to analyze the impact of two imported independent stations on KMPH's revenues. Because the study was filed more than two and one half years after the pleading cycle on the impact issue had been completed it will not be considered in this proceeding. However,

since it addresses the entire Fresno area of dominant influence, it will be treated separately as a petition for special relief.

Pappas resubmitted the "Cooper Study" as an opposition to the certificate of compliance application of San Joaquin Cable TV, Inc., (CAC-05821). At paragraph 5 of *San Joaquin Cable TV, Inc.* (Fresno, California), FCC 76-444, 59 FCC 2d 525 (1976), the Commission reiterated its position and stated:

We do not believe it appropriate to treat Pappas's special relief petition herein. By its own terms the Cooper Study is not limited to the City of Fresno, but speaks to and requests relief in the entire area of dominant influence. The various cable systems within this area have responded in the special relief proceeding, and our withholding of certification to San Joaquin until the Commission completes its analysis of and makes determinations upon all the pleadings in that proceeding could place San Joaquin at a competitive disadvantage with previously-certified Fresno Cable. Our separate consideration of these matters will not prejudice Pappas, since San Joaquin will be subject to any relief afforded Pappas in CSR-962.

[1052] 2. Pappas's petition has generated the oppositions of Fresno Cable TV Co., Televents of San Joaquin Valley, Inc., Warner Cable of Kings County, San Joaquin Cable TV, Inc. and a statement in support of the oppositions filed by Bakersfield Cable TV, Inc. Pappas has responded to the oppositions and Fresno Cable TV has replied to Pappas.¹

¹ We note that Fresno Cable's reply is not contemplated by our Rules, but we have accepted it in an effort to compile a full and complete record.

3. With the exception of some brief introductory remarks, Pappas's entire petition consists of the "Cooper Study." As Pappas states in the introduction, the "Cooper Study" was prepared by Roger N. Cooper, a media research counsel, to assess, "the estimated negative impact of cable television throughout KMPH's service area as a result of the proposed carriage of two distant independent signals."

History

4. Because of the unique nature of this proceeding it would be helpful to briefly outline the history which led to Pappas's submission of the "Cooper Study." KMPH began broadcast operations in October 1971. Since that time Pappas has consistently opposed every application for a certificate of compliance filed by a cable television system located within the Fresno, California major television market (#72) and the Tulare, California smaller television market.² Substantively, these oppositions have been two-pronged. First, Pappas has asserted that it is entitled to mandatory carriage on all those systems which did not propose its carriage, whether the provisions of Sections 76.59 and 76.63 of the Rules require it or not.³ Pappas has advanced the following arguments in

² Pappas's oppositions to the importation of distant signals have been denied in the following cases: *Fresno Cable TV Co., Inc.*, FCC 74-845, 48 FCC 2d 116, *recons. granted in part*, FCC 74-1396, 50 FCC 2d 340 (1974), *stay denied*, FCC 75-360, 52 FCC 2d 249 (1975); *Hanford Cable Co.*, FCC 74-844, 48 FCC 2d 132 (1974), *recons. granted in part*, FCC 74-1395, 50 FCC 2d 351 (1974); *Fresno Cable Television Company, Inc.*, *supra*; and *San Joaquin TV, Inc.*, *supra*. Additionally, these cases have all been consolidated on appeal in the United States Report of Appeal for the District of Columbia, Case Nos. 75-1115, 75-116, 75-1408 and 76-1010.

³ Sections 76.59 and 76.63 set forth the signal carriage requirements for smaller and major television markets (second 50) respectively.

support of this assertion: (a) KMPH is a "local" station even though many of the systems involved are not located within the specified zone of the Tulare market; (b) KMPH is significantly viewed throughout the Fresno market even though it has not been accorded that status by the viewing surveys conducted for the Commission and cannot itself bear the expense of establishing that status pursuant to Section 76.54(b) & (c); (c) KMPH is, pursuant to broadcast rules, affirmatively required to serve the communities where these cable systems are located and non-carriage by cable systems in these communities would hinder KMPH in fulfilling this duty; (d) because of its precarious financial position, KMPH needs the markets served by the cable systems for audience and revenue if it is to remain viable; and (e) KMPH has invested over a million dollars in equipment service to the San Joaquin Valley and mandatory carriage throughout its coverage area is necessary to implement Commission's policy of promoting the development of local television service. The second prong of Pappas's oppositions has been a request that the Commission prohibit the carriage of other distant independent signals on cable sys-[1053]tems located within these two markets. To support this argument, Pappas has alleged: (a) since it is located within a smaller market it is not entitled to syndicated exclusivity protection; (b) even if it were to receive syndicated protection it would be meaningless because it would not be able to compete with major stations in the acquisition of programming; (c) only approximately 50% of KMPH's advertising revenue is derived from Tulare County and national advertising and the remaining portion must come from sources throughout the remaining environs of KMPH's service area (i.e. the San Joaquin Valley); (d) the Commission has an obligation pursuant to Section 307(b) of the Communications Act

to protect the development of locally-owned stations and not to subvert that development by allowing the importation of distant signals operated by licensees having no obligation to serve the needs and interests of the viewers in the San Joaquin Valley; and (c) cable carriage of "local" signals will provide adequate television service to residents of the San Joaquin Valley.

The "Cooper Study"

5. Pappas has continued to advance these arguments in its untiring opposition to every pertinent application for a certificate of compliance. And although the Commission has now granted Pappas "significantly viewed" and therefore "must carry" status throughout Fresno and Tulare Counties, we have consistently rejected Pappas's request that no additional distant independents be carried on the subject cable systems. At paragraphs 5 and 6 of *Fresno Cable Television Company, Inc. supra*, we stated in part:

Turning to the signal carriage issues, we note that we have previously considered the competing interests in detail. In *Fresno Cable TV Co., Inc.*, FCC 74-845, 48 FCC 2d 116, *recons. granted in part*, FCC 74-1396, 50 FCC 2d 340 (1974), *stay denied*, FCC 75-360, 52 FCC 2d 249 (1975) and in *Hanford Cable Co.*, FCC 74-844, 48 FCC 2d 132 (1974), *recons. granted in part*, FCC 74-1395, 50 FCC 2d 351 (1974), we found that KMPH was in need of some relief. Accordingly, we waived portions of Section 76.54 of the Rules to enable the station to establish its status as significantly viewed in Fresno County more easily. We stated that Pappas should submit the certified results of all independent professional audience surveys used to demonstrate viewing strength, and that "[i]f, upon review of those results, we find KMPH is 'significantly viewed'

in a county [i.e., that the station has a share of viewing hours of at least 2 percent (total week hours), and a net weekly circulation of at least 5 percent in that county], we will afford the station mandatory signal carriage rights on all cable systems operating or proposing to operate in that county." Pappas has submitted surveys which satisfy our criteria and establish that KMPH is significantly viewed in several counties, including Fresno. The station is, therefore, a "must carry" pursuant to Section 76.61(a)(5) of the Rules, and we will *sua sponte* waive the procedural requirements of Sections 76.18 and 76.25 and require Fresno Cable to add KMPH to its proposed signal carriage complement without requiring further public notice. Compare *New Worlds Cable TV, Inc.*, FCC 75-332, 52 FCC 2d 301 (1975). We will not, however, preclude Fresno Cable from carrying "distant" independent signals consistent with our Rules. As stated in *Fresno Cable TV Co., Inc.*, and *Hanford Cable Co.*, *supra*, parties seeking to impose restrictions upon carriage of otherwise permissible signals are faced with a substantial burden; absent a "substantial showing," we will not deviate from the "go, no-go" concept of the carriage rules. Clarifying these points, we held that any showings must contain specificity of fact and demonstrate that the proposed cable television service will adversely affect the station's revenues to an extent that impairs its ability to serve the public interest. Without such precise impact statistics, we are reluctant to handicap a new cable television system by denying it "the minimum amount of new service needed to attract large amounts of investment capital for the construction of new systems . . . to open the way for the full development of cable's potential." Paragraph 90, [1054] *Cable Television Report and Order*, FCC 72-108, 36 FCC 2d 143, 178 (1972).

Each station shows a steadily improving financial posture, and since neither Pappas nor Capital Cities has timely submitted the requisite detailed impact analysis, their requests will be denied.

6. The "Cooper Study" was submitted by Pappas in an attempt to demonstrate the predicted adverse impact on KMPH of distant signal carriage by cable systems throughout the Fresno ADI. The staff's evaluation of that study and Pappas' reply to the oppositions ("Cooper Study II") is contained in Appendix A⁹ attached hereto. While the "Cooper Study" is an extensive document designed to provide an in-depth analysis of the effect of distant signal carriage in the Fresno and Tulare markets on KMPH, it can be reduced to three interrelated predictions: (a) Cable television penetration in the Fresno, California Area of Dominant Influence (ADI) will grow from the present level of 6% to between 45% and 55% in 1985; (b) Averaged over the entire Fresno ADI, it is estimated that KMPH's share of the cable audience would be 43% less than its share of the non-cable audience in 1985 if the Commission allows the importation of two distant independents. It is predicted that KMPH's non-cable share of audience would increase from the present level of 9% to 13% in 1985; and (c) the importation of two distant independent signals would cause KMPH's revenue to be 11.7% lower at 50% cable television penetration than if cable television systems were not allowed to carry any distant independent signals.

7. The five oppositions to Pappas's petition generally stress the same matters: (a) Many of the "Cooper Study's" figures and conclusions are not relevant to the situation in question; (b) the basic assumptions under-

⁹ Appendix deleted. May be secured from Commission in Wash., D.C.

lying the gathering of data are often unsupported or otherwise highly questionable; (c) the "Cooper Study" presents only generalizations and unsupported assertions rather than a factual showing concerning KMPH's present financial condition and its recent financial history; (d) the "Cooper Study" completely fails to link the predicted audience and revenue losses directly to the importation of two distant independent signals; (e) the "Cooper Study's" use of Bakersfield, California as an analogous market is misplaced since significant differences exist between the two markets, particularly the fact that the Bakersfield market imports four distant Los Angeles independents and three Los Angeles network affiliates. Additionally, the opposition of Fresno Cable TV Co., Inc., contains a "Review and Comments on 'The Cooper Study'" prepared by Edward Shafer, an economic consultant in the communication industry. In contrast, Mr. Shafer's analysis produced the following projections:

(a) Assuming proper management, Station KMPH (TV) will become a viable UHF independent station notwithstanding cable television operations within the Fresno ADI. The Cooper Study fails to provide any projections of KMPH's audience, revenues, expenses and profits for 1985. Without such data, it is not possible to predict the financial position of KMPH(TV) in 1985.

(b) Station KMPH(TV) is likely to increase its audience share to at least 13% in 1985. Even with cable television penetration of 50% in the ADI, KMPH's overall audience share will increase some 19% from its present 9% level to 10.7% (higher than [1055] Cooper's estimate of 10.2%). Of the local stations, KMPH's share of audience would be 12.6% in 1985 as compared to 13.7% without cable television at 50% penetration.

(c) The projected 17% increase in the number of households in the Fresno ADI will produce a corresponding increase in the station audiences. The "average" audience of KMPH(TV) will grow to 11,872, a 39% increase over 1975.

(d) The Cooper Study's forecast of an 11.7% revenue loss for KMPH(TV) as a result of 50% penetration by cable television is grossly misleading. In fact, it is reasonable to conclude that KMPH will enjoy significantly greater revenues in 1985 than during its last fiscal year.

(e) There is nowhere in the Cooper Study an explicit, unqualified statement that the growth of cable television in the Fresno ADI will have such an impact on Station KMPH(TV) as to preclude it from introducing local news programming and expand its current public affairs—public service programming. Moreover, Mr. Cooper's reliance on the Bakersfield market experience to support even his guarded intimation of the effect of CATV growth in KMPH's future programming is wholly misplaced. Assuming, *arguendo*, the validity of the data relied upon by Mr. Cooper with respect to station programming in the Bakersfield market, there are numerous reasons why the Bakersfield experience does not offer a valid basis for comparison with Fresno. However, it should be emphasized that even with CATV penetration of some 50% in the Bakersfield market, the local stations experienced striking gains in national and local revenues from 1967 to 1974.

8. The response of Pappas to the opposition is generally a restatement of the history of the proceeding and an indictment of the study conducted by Mr. Shafer. Pappas emphasized the alleged uniqueness of the Fresno market and declares:

The Fresno television market is like no other in the second fifty or, for that matter, like the majority of the top fifty markets in the United States. No such "second fifty" market has as much television service available off-the-air. Indeed, with three network affiliates and an independent station licensed to Fresno, a Spanish language station in Hanford, and KMPH in Tulare, all placing City Grade signals over Fresno, this area has more commercial television service than most of the top fifty television markets, including Washington, D.C., the nation's eighth television market.

To support its attacks on Mr. Shafer's study, Pappas submitted additional "Comments of Roger Cooper" ("Cooper Study II"). These comments are also analyzed by the staff in Appendix A.⁹ However, it is important to note the basic predictions arrived at in "Cooper Study II." Mr. Cooper estimates that expenses will increase from the present \$1,503,217 to \$2,251,642 by 1985. At that rate he predicts that KMPH would have a profit of \$379,758 with no importation of distant signals; however, with the importation of two distant signals and 50% cable penetration, that profit would be reduced to \$130,358. Mr. Cooper further estimates that if KMPH elected to provide local news programming, the additional expense would be \$346,248 by 1985. Therefore, Mr. Cooper declares, if KMPH elects to provide local news [1056] which it does not presently program, it cannot earn a profit by 1985 unless importation of distant signals is prohibited. Finally, in response to the Shafer Study, Mr. Cooper revised downward the predicted revenue impact on KMPH at 50% cable penetra-

⁹ Appendix deleted. May be secured from Commission in Wash., D.C.

tion from 11.7% to 7.9%. This was due to the fact that the initial prediction was based on a direct relationship between "share and market revenue." However, Cooper's review of his first prediction showed that KMPH's share of revenue has been higher than its share of audience.*

Discussion

9. We have consistently held that parties seeking to impose restrictions upon carriage of otherwise permissible signals are faced with a substantial burden and absent a compelling showing we will not deviate from the "go, no-go" concept of the carriage rules.⁴ The compelling showing necessary to meet this burden must demonstrate that the proposed cable television service will adversely affect the station's revenues to an extent that impairs its ability to serve the public interest. It was in response to this requirement that Pappas submitted the "Cooper Study." However, simply submitting a showing that purports to demonstrate the requisite adverse affects does not satisfy the burden of proof. The Commission staff has undertaken an extensive analysis of the "Cooper Study" and for the reasons outlined below (and in the attached Appendix⁹) we conclude that Pappas has failed

* Additionally, on September 17, 1976, Pappas filed a "Request for Oral Argument and an Open Proceeding." Pappas stated that oral argument was necessary to expose the Commission to the positions of all parties. Aside from the fact that this request was filed almost six months after the pleading cycle in this matter was completed we believe that the nearly 1,000 pages of pleadings have fully exposed the Commission to the positions of all parties and we can perceive no useful purpose which would be served by holding an oral argument. We will therefore, deny Pappas's request.

⁴ See, e.g., *Fresno Cable TV Co., Inc. and Hanford Cable Co., supra.*

⁹ Appendix deleted. May be secured from Commission in Wash., D.C.

to demonstrate with specificity of fact that the importation of distant independent signals into the Fresno ADI will adversely affect KMPH's revenues to the extent that its ability to serve the public interest would be impaired.

10. The Cooper Study is a straightforward but statistically unpersuasive attempt to project to 1985 a negative financial impact on KMPH from the carriage of distant independent signals on neighboring cable systems. By its nature, the study is speculative. It estimates 1985 expenses for the station at \$2.25 million. Against this it projects revenues ranging from \$2.63 million to \$2.42 million—the higher figure if KMPH is protected against all distant independents, the lower figure if our rules prevail. There is no dispute that the station is becoming profitable and that its audience is growing steadily. By Mr. Cooper's own figures, our failure to grant the instant petition will still allow a projected profit of nearly \$200,000 in 1985. Thus, the study's finding of a nearly 8% negative financial impact from distant signal competition to KMPH does not represent a "loss" but a reduced profit. As shown below, however, even that 8% figure is open to serious question.

11. Initially, we question the value of the "trend line" model used for [1057] revenue projection by the Cooper Study.⁵ This type of forecast allows for an extremely large statistical error, undermining our confidence in the predictions. Moreover, the study assumes—

⁵ A linear trend model is a mathematical equation in the form of a straight line which defines a relationship between a dependent variable (revenue in this case) and a time period (a year in this case) based on known data. This equation is then used to predict a value of the dependent variable for a new time period. In Mr. Cooper's study revenue for the Fresno market from 1967 to 1974, is used to derive the equation and then it is applied to 1985 for a predicted market revenue.

without support of any kind—that the ratio of KMPH's revenue to its audience will decrease as *audience share* increases. If the ratio were to remain constant or increase, as well it might, KMPH's revenues in 1985 would exceed the Cooper predictions substantially.

12. Nevertheless, assuming *arguendo* that the study's total revenue projection of \$2.63 million for 1985 may be relied upon, we still find two basic weaknesses in Mr. Cooper's calculations tending to inflate the 7.9% negative impact said to result from distant signal importation against KMPH. First, the Bakersfield ADI is used as a model to estimate future cable penetration in the Fresno ADI—although the current figure for Bakersfield is 52% compared with only 6% presently for the Fresno ADI. Considering the Bakersfield ADI together with the 50% penetration in the city of Porterville, and also making use of the Rand cable penetration model, the Cooper Study projects a 50% penetration for the Fresno ADI by 1985. It is important to note, however, that both the Porterville and Rand figures are for discrete communities, not diffuse ADI's. An ADI typically contains rural densities of population which cannot support cable systems under present and foreseeable technology. For example, the Bakersfield ADI is 18% rural, 82% urban, but the Fresno ADI, even by 1985, will remain more rural (31% rural, 69% urban) by Mr. Cooper's own estimate. Accordingly, Bakersfield is not the best of predictive models. Assuming a correlation between extent of urbanization and cable penetration, a rough adjustment of the Bakersfield model to conform it to Fresno would reduce predicted negative impact by the urbanization differential: 7.9% times 69/82 equals 6.6%.

13. A second basic weakness in Mr. Cooper's calculations proceeds from his assumption that two distant independent signals, on the average, could be imported

into the entire Fresno ADI. However, that average is swelled by a finding that one distant independent would be permitted, and carried, in certain portions of the Hanford and Tulare smaller markets which are not overlapped by the Fresno specified zone. In fact, these portions—which account for nearly 20% of the Fresno ADI, are permitted no distant independents whatever under present rules.⁶ A further rough adjustment to Mr. Cooper's predicted negative revenue impact to account for this factual error would bring that figure down to 6%.⁷

14. When these adjustments are considered in light of our concern over the study's simplistic methods of revenue projection (paragraph [1058] 11), and when it is remembered that Mr. Cooper forecasts growing revenues, audiences and profits for KMPH with or without competition from distant independents, we are unable to conclude that the relief sought is needed to prevent loss of service to the public.⁸

⁶ Section 76.59 provides for the carriage of one independent station in a smaller television market be it local or distant. Since KMPH is an independent "must-carry" signal in the Tulare market no other independents may be imported unless they are also "must-carries," but certainly no distant independents.

⁷ Since one distant signal was used in this area, as compared to the average of 2 signals for the entire ADI, the estimate should be reduced by 1/2 of 19% or 9-1/2%. ($6.7\% \times 90-1/2\% = 6.1\%$).

⁸ Petitioner asserts that a large enough profit—such as it predicts would be realized if distant independents were banned from the KMPH service area—would allow it to begin providing local news service. Given the forecast of profitability, in any event, by 1985 it is simply going too far for the Commission to concern itself with the reinvestment policies of the station.

In view of the foregoing, the Commission finds that a grant of the subject petition would not be in the public interest.

Accordingly, IT IS ORDERED, That the petition for special relief (CSR-962) filed by Pappas Television, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
Vincent J. Mullins, *Secretary*.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1115

September Term, 1977

Pappas Television, Inc., Petitioner

v.

Federal Communications Commission and
United States of America, Respondents

Hanford Cable Co., Inc., Intervenor

75-1116

Pappas Television, Inc., Petitioner

v.

Federal Communications Commission and
United States of America, Respondents

Fresno Cable TV Company, Intervenor

75-1408

Pappas Television, Inc., Petitioner

v.

Federal Communications Commission
and United States of America, Respondents

Televents of San Joaquin Valley, Inc., Intervenor

76-1010

Pappas Television, Inc., Petitioner

v.

Federal Communications Commission
and United States of America, Respondents

Fresno Cable TV Co., Inc., Intervenor

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1494 -2- September Term, 1977

Pappas Television, Inc., Petitioner

v.

Federal Communications Commission
and United States of America, Respondents

San Joaquin Cable TV, Intervenor
76-2042

Pappas Television, Inc., Petitioner

v.

Federal Communications Commission
and United States of America, Respondents

Fresno Cable TV Co., Inc.
San Joaquin Cable TV, Intervenor

PETITIONS FOR REVIEW OF ORDERS OF THE FED-
ERAL COMMUNICATIONS COMMISSION

Before: McGOWAN, LEVENTHAL AND ROBB, Circuit
Judges

JUDGMENT

These causes came on to be heard on petitions for review of orders of the Federal Communications Commission and were argued by counsel. On consideration of

Bills of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

the foregoing, and in accordance with the attached memorandum, it is

ORDERED AND ADJUDGED by this Court that the orders of the Federal Communications Commission on review herein are hereby affirmed as to Nos. 75-1116, 75-1408, 76-1010, 76-1494 and 76-2042.

It is FURTHER ORDERED by the Court, that the petition in No. 75-1115 is hereby dismissed.

Per Curiam
For the Court
/s/ George A. Fisher
George A. Fisher
Clerk

MEMORANDUM

These petitions for review come to us against the backdrop of a rulemaking proceeding directed towards the establishment of the levels of cable television service to which each of the national markets would be entitled. *Cable Television Report and Order*, 36 F.C.C. 2d 143 (1972). Relief against the standards therein prescribed is available to local UHF and VHF stations only by invoking a special relief procedure provided by the Commission. 47 C.F.R. 76.7. As is ordinarily true of efforts to obtain a waiver of the policies established in rulemaking, the petitioner bears a heavy burden to demonstrate both the need for waiver and its compatibility with the public interest.

The appeals before us fall into two groups. Nos. 75-1115, 1116, and 1408 were petitioner's first effort, asserting adverse economic impact upon itself, to obtain such special relief in connection with three applications for certificates of compliance for cable television systems.

In No. 75-1115, the application of Hanford Cable Co. was denied, and respondent FCC argues—persuasively, we believe—that petitioner has no interest justifying judicial review of that order, since the certificate grant opposed by it was refused. Petitioner purports to be concerned about language in the FCC's opinion as being detrimental to petitioner's claims generally, but we do not think there is a controversy before us warranting our consideration; and we direct that the petition in No. 75-1115 be dismissed.

In Nos. 1116 and 1408, the cable service applicants, Fresno Cable T.V. Company and Televents of San Joaquin Valley, Inc., were successful; and the merits of petitioner's objections are properly before us. In neither instance do we conclude that the showing made by petitioner sustains the substantial burden it must carry to warrant our directing that it be given special relief from the provisions of the Commission's rules, which are fully applicable because the certificates granted are outside petitioner's own market (Tulare). To the extent that petitioner complains that the Commission has no standards to apply, the cases cited by the parties reveal that the Commission will accept a specific showing, albeit one difficult to establish, that the challenged aspects of the cable programming will substantially damage local stations *and* that such aspects could be deleted without preventing cable from successfully entering the market. To the extent that petitioner complains of discriminatory treatment in relation to the grant of special relief to another objectant, KAIL, the record contains ample evidence of the differences in their respective circumstances to render rational the Commission's differentiation between the two.

The second group of appeals (Nos. 76-1010, 76-1494, and 76-2042) grow out of later oppositions by peti-

tioners to extensions of cable services. In the first two, the Commission respectively granted certificates of compliance to Fresno Cable T.V. Company covering operations in Fresno and Fresno County, and to San Joaquin Cable T.V. in Fresno. Petitioner, three years after its original objections and at a time when these proceedings were far advanced, filed an economic impact analysis, known as the Cooper Study. With the consent of petitioner, the Commission set up a special relief proceeding (No. 76-2042) covering an area as wide as that of the Cooper Study (which went beyond the area served by Fresno and San Joaquin), in which five cable systems participated. The Commission weighed the Cooper Study with care, making such adjustments as it believed to be warranted, and concluded that it did not make out a case of economic injury to petitioner sufficient to justify waiver of the standards set in its rules. Our examination of the record reveals substantial evidence to support this conclusion, and the reach of our substantive reviewing function is thus exhausted. Petitioner's claim of procedural impropriety in the Commission's handling of a staff rebuttal of the Cooper Study fails because the essential condition of its being before us was not met, 47 U.S.C. § 405; and, in any event, we do not regard the Staff Evaluation as a filing by a party to which petitioner was entitled to respond prior to decision.
